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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1975

JANUARY 30 THROUGH MARCH 24, 1976

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATUM

263 U. S. 202, line 18: "15 Fed. 722" should be "13 Fed. 722".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

EDWARD H. LEVI, Attorney General.
ROBERT H. BORK, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.*
ALFRED WONG, Acting Marshal.*
EDWARD G. HUDON, Librarian.

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*Mr. Hepler resigned as Marshal, and, effective February 12, 1976, Mr. Wong was appointed Acting Marshal.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1975

BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE UNITED STATES SENATE, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75–436. Argued November 10, 1975—
Decided January 30, 1976*

The Federal Election Campaign Act of 1971 (Act), as amended in 1974, (a) limits political contributions to candidates for federal elective office by an individual or a group to $1,000 and by a political committee to $5,000 to any single candidate per election, with an overall annual limitation of $25,000 by an individual contributor; (b) limits expenditures by individuals or groups "relative to a clearly identified candidate" to $1,000 per candidate per election, and by a candidate from his personal or family funds to various specified annual amounts depending upon the federal office sought, and restricts overall general election and primary campaign expenditures by candidates to various specified amounts, again depending upon the federal office sought; (c) requires political committees to keep detailed records of contributions and expenditures, including the name and address of each individual contributing in excess of $10, and his occupation and

*Together with No. 75–437, *Buckley et al.* v. *Valeo, Secretary of the United States Senate, et al.*, on appeal from the United States District Court for the District of Columbia.

principal place of business if his contribution exceeds $100, and to file quarterly reports with the Federal Election Commission disclosing the source of every contribution exceeding $100 and the recipient and purpose of every expenditure over $100, and also requires every individual or group, other than a candidate or political committee, making contributions or expenditures exceeding $100 "other than by contribution to a political committee or candidate" to file a statement with the Commission; and (d) creates the eight-member Commission as the administering agency with recordkeeping, disclosure, and investigatory functions and extensive rulemaking, adjudicatory, and enforcement powers, and consisting of two members appointed by the President *pro tempore* of the Senate, two by the Speaker of the House, and two by the President (all subject to confirmation by both Houses of Congress), and the Secretary of the Senate and the Clerk of the House as *ex officio* nonvoting members. Subtitle H of the Internal Revenue Code of 1954 (IRC), as amended in 1974, provides for public financing of Presidential nominating conventions and general election and primary campaigns from general revenues and allocates such funding to conventions and general election campaigns by establishing three categories: (1) "major" parties (those whose candidate received 25% or more of the vote in the most recent election), which receive full funding; (2) "minor" parties (those whose candidate received at least 5% but less than 25% of the votes at the last election), which receive only a percentage of the funds to which the major parties are entitled; and (3) "new" parties (all other parties), which are limited to receipt of post-election funds or are not entitled to any funds if their candidate receives less than 5% of the vote. A primary candidate for the Presidential nomination by a political party who receives more than $5,000 from private sources (counting only the first $250 of each contribution) in each of at least 20 States is eligible for matching public funds. Appellants (various federal officeholders and candidates, supporting political organizations, and others) brought suit against appellees (the Secretary of the Senate, Clerk of the House, Comptroller General, Attorney General, and the Commission) seeking declaratory and injunctive relief against the above statutory provisions on various constitutional grounds. The Court of Appeals, on certified questions from the District Court, upheld all but one of the statutory provisions. A three-judge District Court upheld the constitutionality of Subtitle H. *Held:*

1 Syllabus

1. This litigation presents an Art. III "case or controversy," since the complaint discloses that at least some of the appellants have a sufficient "personal stake" in a determination of the constitutional validity of each of the challenged provisions to present "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241. Pp. 11–12.

2. The Act's contribution provisions are constitutional, but the expenditure provisions violate the First Amendment. Pp. 12–59.

(a) The contribution provisions, along with those covering disclosure, are appropriate legislative weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions, and the ceilings imposed accordingly serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion. Pp. 23–38.

(b) The First Amendment requires the invalidation of the Act's independent expenditure ceiling, its limitation on a candidate's expenditures from his own personal funds, and its ceilings on overall campaign expenditures, since those provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate. Pp. 39–59.

3. The Act's disclosure and recordkeeping provisions are constitutional. Pp. 60–84.

(a) The general disclosure provisions, which serve substantial governmental interests in informing the electorate and preventing the corruption of the political process, are not overbroad insofar as they apply to contributions to minor parties and independent candidates. No blanket exemption for minor parties is warranted since such parties in order to prove injury as a result of application to them of the disclosure provisions need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals in violation of their First Amendment associational rights. Pp. 64–74.

(b) The provision for disclosure by those who make inde-

pendent contributions and expenditures, as narrowly construed to apply only (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent to some person other than a candidate or political committee and (2) when they make an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate is not unconstitutionally vague and does not constitute a prior restraint but is a reasonable and minimally restrictive method of furthering First Amendment values by public exposure of the federal election system. Pp. 74–82.

(c) The extension of the recordkeeping provisions to contributions as small as those just above $10 and the disclosure provisions to contributions above $100 is not on this record overbroad since it cannot be said to be unrelated to the informational and enforcement goals of the legislation. Pp. 82–84.

4. Subtitle H of the IRC is constitutional. Pp. 85–109.

(a) Subtitle H is not invalid under the General Welfare Clause but, as a means to reform the electoral process, was clearly a choice within the power granted to Congress by the Clause to decide which expenditures will promote the general welfare. Pp. 90–92.

(b) Nor does Subtitle H violate the First Amendment. Rather than abridging, restricting, or censoring speech, it represents an effort to use public money to facilitate and enlarge public discussion and participation in the electoral process. Pp. 92–93.

(c) Subtitle H, being less burdensome than ballot-access regulations and having been enacted in furtherance of vital governmental interests in relieving major-party candidates from the rigors of soliciting private contributions, in not funding candidates who lack significant public support, and in eliminating reliance on large private contributions for funding of conventions and campaigns, does not invidiously discriminate against minor and new parties in violation of the Due Process Clause of the Fifth Amendment. Pp. 93–108.

(d) Invalidation of the spending-limit provisions of the Act does not render Subtitle H unconstitutional, but the Subtitle is severable from such provisions and is not dependent upon the existence of a generally applicable expenditure limit. Pp. 108–109.

5. The Commission's composition as to all but its investigative and informative powers violates Art. II, § 2, cl. 2. With respect to the Commission's powers, all of which are ripe for review,

1 Syllabus

to enforce the Act, including primary responsibility for bringing civil actions against violators, to make rules for carrying out the Act, to temporarily disqualify federal candidates for failing to file required reports, and to authorize convention expenditures in excess of the specified limits, the provisions of the Act vesting such powers in the Commission and the prescribed method of appointment of members of the Commission to the extent that a majority of the voting members are appointed by the President *pro tempore* of the Senate and the Speaker of the House, violate the Appointments Clause, which provides in pertinent part that the President shall nominate, and with the Senate's advice and consent appoint, all "Officers of the United States," whose appointments are not otherwise provided for, but that Congress may vest the appointment of such inferior officers, as it deems proper, in the President alone, in the courts, or in the heads of departments. Hence (though the Commission's past acts are accorded *de facto* validity and a stay is granted permitting it to function under the Act for not more than 30 days), the Commission, as presently constituted, may not because of that Clause exercise such powers, which can be exercised only by "Officers of the United States" appointed in conformity with the Appointments Clause, although it may exercise such investigative and informative powers as are in the same category as those powers that Congress might delegate to one of its own committees. Pp. 109–143.

No. 75–436, 171 U. S. App. D. C. 172, 519 F. 2d 821, affirmed in part and reversed in part; No. 75–437, 401 F. Supp. 1235, affirmed.

Per curiam opinion, in the "case or controversy" part of which (*post*, pp. 11–12) all participating Members joined; and as to all other Parts of which BRENNAN, STEWART, and POWELL, JJ., joined; MARSHALL, J., joined in all but Part I–C–2; BLACKMUN, J., joined in all but Part I–B; REHNQUIST, J., joined in all but Part III–B–1; BURGER, C. J., joined in Parts I–C and IV (except insofar as it accords *de facto* validity for the Commission's past acts); and WHITE, J., joined in Part III. BURGER, C. J., *post*, p. 235, WHITE, J., *post*, p. 257, MARSHALL, J., *post*, p. 286, BLACKMUN, J., *post*, p. 290, and REHNQUIST, J., *post*, p. 290, filed opinions concurring in part and dissenting in part. STEVENS, J., took no part in the consideration or decision of the cases.

Ralph K. Winter, Jr., pro hac vice, Joel M. Gora, and

Brice M. Clagett argued the cause for appellants. With them on the briefs was *Melvin L. Wulf.*

Deputy Solicitor General Friedman, Archibald Cox, Lloyd N. Cutler, and *Ralph S. Spritzer* argued the cause for appellees. With *Mr. Friedman* on the brief for appellees Levi and the Federal Election Commission were *Attorney General Levi, pro se, Solicitor General Bork,* and *Louis F. Claiborne.* With *Mr. Cutler* on the brief for appellees Center for Public Financing of Elections et al. were *Paul J. Mode, Jr., William T. Lake, Kenneth J. Guido, Jr.,* and *Fred Wertheimer.* With *Mr. Spritzer* on the brief for appellee Federal Election Commission was *Paul Bender. Attorney General Levi, pro se, Solicitor General Bork,* and *Deputy Solicitor General Randolph* filed a brief for appellee Levi and for the United States as *amicus curiae.*†

PER CURIAM.

These appeals present constitutional challenges to the key provisions of the Federal Election Campaign Act of 1971 (Act), and related provisions of the Internal Revenue Code of 1954, all as amended in 1974.[1]

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†*Thomas F. Monaghan* filed a brief for James B. Longley as *amicus curiae* urging reversal.

Mr. Cox filed a brief for Hugh Scott et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Jerome B. Falk, Jr., Daniel H. Lowenstein, Howard F. Sachs,* and *Guy L. Heinemann* for the California Fair Political Practices Commission et al.; by *Lee Metcalf, pro se,* and *G. Roger King* for Mr. Metcalf; by *Vincent Hallinan* for the Socialist Labor Party; by *Marguerite M. Buckley* for the Los Angeles County Central Committee of the Peace and Freedom Party; and by the Committee for Democratic Election Laws.

[1] Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263. The pertinent portions of the legislation are set forth in the Appendix to this opinion.

The Court of Appeals, in sustaining the legislation in large part against various constitutional challenges,[2] viewed it as "by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress." 171 U. S. App. D. C. 172, 182, 519 F. 2d 821, 831 (1975). The statutes at issue summarized in broad terms, contain the following provisions: (a) individual political contributions are limited to $1,000 to any single candidate per election, with an overall annual limitation of $25,000 by any contributor; independent expenditures by individuals and groups "relative to a clearly identified candidate" are limited to $1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties are subject to prescribed limits; (b) contributions and expenditures above certain threshold levels must be reported and publicly disclosed; (c) a system for public funding of Presidential campaign activities is established by Subtitle H of the Internal Revenue Code;[3] and (d) a Federal Election Commission is established to administer and enforce the legislation.

This suit was originally filed by appellants in the United States District Court for the District of Columbia. Plaintiffs included a candidate for the Presidency of the United States, a United States Senator who is a candidate for re-election, a potential contributor, the

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[2] 171 U. S. App. D. C. 172, 519 F. 2d 821 (1975).

[3] The Revenue Act of 1971, Title VIII, 85 Stat. 562, as amended, 87 Stat. 138, and further amended by the Federal Election Campaign Act Amendments of 1974, § 403 *et seq.*, 88 Stat. 1291. This Subtitle consists of two parts: Chapter 95 deals with funding national party conventions and general election campaigns for President, and Chapter 96 deals with matching funds for Presidential primary campaigns.

Committee for a Constitutional Presidency—McCarthy '76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, Inc., the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc. The defendants included the Secretary of the United States Senate and the Clerk of the United States House of Representatives, both in their official capacities and as *ex officio* members of the Federal Election Commission. The Commission itself was named as a defendant. Also named were the Attorney General of the United States and the Comptroller General of the United States.

Jurisdiction was asserted under 28 U. S. C. §§ 1331, 2201, and 2202, and § 315 (a) of the Act, 2 U. S. C. § 437h (a) (1970 ed., Supp. IV).[4] The complaint sought both a

[4] "§ 437h. Judicial review.

"(a) . . .

"The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18. The district court immediately shall certify all questions of constitutionality of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18, to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

"(b) . . .

"Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

"(c) . . .

"It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite

declaratory judgment that the major provisions of the Act were unconstitutional and an injunction against enforcement of those provisions. Appellants requested the convocation of a three-judge District Court as to all matters and also requested certification of constitutional questions to the Court of Appeals, pursuant to the terms of § 315 (a). The District Judge denied the application for a three-judge court and directed that the case be transmitted to the Court of Appeals. That court entered an order stating that the case was "preliminarily deemed" to be properly certified under § 315 (a). Leave to intervene was granted to various groups and individuals.[5] After considering matters regarding factfinding procedures, the Court of Appeals entered an order en banc remanding the case to the District Court to (1) identify the constitutional issues in the complaint; (2) take whatever evidence was found necessary in addition to the submissions suitably dealt with by way of judicial notice; (3) make findings of fact with reference to those issues; and (4) certify the constitutional questions arising from the foregoing steps to the Court of Appeals.[6] On remand, the District

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to the greatest possible extent the disposition of any matter certified under subsection (a) of this section."

[5] Center for Public Financing of Elections, Common Cause, the League of Women Voters of the United States, Chellis O'Neal Gregory, Norman F. Jacknis, Louise D. Wides, Daniel R. Noyes, Mrs. Edgar B. Stern, Charles P. Taft, John W. Gardner, and Ruth Clusen.

[6] The Court of Appeals also suggested in its en banc order that the issues arising under Subtitle H (relating to the public financing of Presidential campaigns) might require, under 26 U. S. C. § 9011 (b) (1970 ed., Supp. IV), a different mode of review from the other issues raised in the case. The court suggested that a three-judge District Court should consider the constitutionality of these provisions in order to protect against the contingency that this Court might eventually hold these issues to be subject to determination by a three-judge court, either under § 9011 (b), or 28 U. S. C. §§ 2282,

Judge entered a memorandum order adopting extensive findings of fact and transmitting the augmented record back to the Court of Appeals.

On plenary review, a majority of the Court of Appeals rejected, for the most part, appellants' constitutional attacks. The court found "a clear and compelling interest," 171 U. S. App. D. C., at 192, 519 F. 2d, at 841, in preserving the integrity of the electoral process. On that basis, the court upheld, with one exception,[7] the substantive provisions of the Act with respect to contributions, expenditures, and disclosure. It also sustained the constitutionality of the newly established Federal Election Commission. The court concluded that, notwithstanding the manner of selection of its members and the breadth of its powers, which included nonlegislative functions, the Commission is a constitutionally authorized agency created to perform primarily legislative functions.[8]

2284. 171 U. S. App. D. C. 168, 170, 519 F. 2d 817, 819 (1975). The case was argued simultaneously to both the Court of Appeals, sitting en banc, and a three-judge District Court. The three-judge court limited its consideration to issues under Subtitle H. The three-judge court adopted the Court of Appeals' opinion on these questions *in toto* and simply entered an order with respect to those matters. 401 F. Supp. 1235. Thus, two judgments are before us—one from each court—upholding the constitutionality of Subtitle H, though the two cases before the Court will generally be referred to hereinafter in the singular. Since the jurisdiction of this Court to hear at least one of the appeals is clear, we need not resolve the jurisdictional ambiguities that occasioned the joint sitting of the Court of Appeals and the three-judge court.

[7] The court held one provision, § 437a, unconstitutionally vague and overbroad on the ground that the provision is "'susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance.'" 171 U. S. App. D. C., at 183, 519 F. 2d, at 832. No appeal has been taken from that holding.

[8] The court recognized that some of the powers delegated to the

The provisions for public funding of the three stages of the Presidential selection process were upheld as a valid exercise of congressional power under the General Welfare Clause of the Constitution, Art. I, § 8.

In this Court, appellants argue that the Court of Appeals failed to give this legislation the critical scrutiny demanded under accepted First Amendment and equal protection principles. In appellants' view, limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment, since virtually all meaningful political communications in the modern setting involve the expenditure of money. Further, they argue that the reporting and disclosure provisions of the Act unconstitutionally impinge on their right to freedom of association. Appellants also view the federal subsidy provisions of Subtitle H as violative of the General Welfare Clause, and as inconsistent with the First and Fifth Amendments. Finally, appellants renew their attack on the Commission's composition and powers.

At the outset we must determine whether the case before us presents a "case or controversy" within the meaning of Art. III of the Constitution. Congress may not, of course, require this Court to render opinions in matters which are not "cases or controversies." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). We must therefore decide whether appellants have the "personal stake in the outcome of the controversy" necessary to meet the requirements of Art. III. *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). It is clear that Congress, in en-

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Commission, when exercised in a concrete context, may be predominantly executive or judicial or unrelated to the Commission's legislative function; however, since the Commission had not yet exercised most of these challenged powers, consideration of the constitutionality of those grants of authority was postponed. See n. 157, *infra*.

acting 2 U. S. C. § 437h (1970 ed., Supp. IV),[9] intended to provide judicial review to the extent permitted by Art. III. In our view, the complaint in this case demonstrates that at least some of the appellants have a sufficient "personal stake" [10] in a determination of the constitutional validity of each of the challenged provisions to present "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co.* v. *Haworth, supra,* at 241.[11]

I. CONTRIBUTION AND EXPENDITURE LIMITATIONS

The intricate statutory scheme adopted by Congress to regulate federal election campaigns includes restric-

[9] See n. 4, *supra.*

[10] This Court has held, for instance, that an organization "may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure . . . of their affiliation." *NAACP* v. *Alabama,* 357 U. S. 449, 458 (1958). See also *Bates* v. *Little Rock,* 361 U. S. 516, 523 n. 9 (1960). Similarly, parties with sufficient concrete interests at stake have been held to have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights. *Palmore* v. *United States,* 411 U. S. 389 (1973); *Glidden Co.* v. *Zdanok,* 370 U. S. 530 (1962); *Coleman* v. *Miller,* 307 U. S. 433 (1939).

[11] Accordingly, the two relevant certified questions are answered as follows:

1. Does the first sentence of § 315 (a) of the Federal Election Campaign Act, as amended, 2 U. S. C. § 437h (a) (1970 ed., Supp. IV), in the context of this action, require courts of the United States to render advisory opinions in violation of the "case or controversy" requirement of Article III, § 2, of the Constitution of the United States? NO.

2. Has each of the plaintiffs alleged sufficient injury to his constitutional rights enumerated in the following questions to create a constitutional "case or controversy" within the judicial power under Article III? YES.

tions on political contributions and expenditures that apply broadly to all phases of and all participants in the election process. The major contribution and expenditure limitations in the Act prohibit individuals from contributing more than $25,000 in a single year or more than $1,000 to any single candidate for an election campaign [12] and from spending more than $1,000 a year "relative to a clearly identified candidate." [13] Other provisions restrict a candidate's use of personal and family resources in his campaign [14] and limit the overall amount that can be spent by a candidate in campaigning for federal office.[15]

The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case.[16] Thus, the critical con-

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[12] See 18 U. S. C. §§ 608 (b)(1), (3) (1970 ed., Supp. IV), set forth in the Appendix, *infra*, at 189. An organization registered as a political committee for not less than six months which has received contributions from at least 50 persons and made contributions to at least five candidates may give up to $5,000 to any candidate for any election. 18 U. S. C. § 608 (b)(2) (1970 ed., Supp. IV), set forth in the Appendix, *infra*, at 189. Other groups are limited to making contributions of $1,000 per candidate per election.

[13] See 18 U. S. C. § 608 (e) (1970 ed., Supp. IV), set forth in the Appendix, *infra*, at 193–194.

[14] See 18 U. S. C. § 608 (a) (1970 ed., Supp. IV), set forth in the Appendix, *infra*, at 187–189.

[15] See 18 U. S. C. § 608 (c) (1970 ed., Supp. IV), set forth in the Appendix, *infra*, at 190–192.

[16] Article I, § 4, of the Constitution grants Congress the power to regulate elections of members of the Senate and House of Representatives. See *Smiley* v. *Holm*, 285 U. S. 355 (1932); *Ex parte Yarbrough*, 110 U. S. 651 (1884). Although the Court at one time indicated that party primary contests were not "elections" within the meaning of Art. I, § 4, *Newberry* v. *United States*, 256 U. S. 232 (1921), it later held that primary elections were within the Constitution's grant of authority to Congress. *United States* v.

stitutional questions presented here go not to the basic power of Congress to legislate in this area, but to whether the specific legislation that Congress has enacted interferes with First Amendment freedoms or invidiously discriminates against nonincumbent candidates and minor parties in contravention of the Fifth Amendment.

A. General Principles

The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U. S. 476, 484 (1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters* v. *New York*, 333 U. S. 507, 510 (1948), "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . . ." *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candi-

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Classic, 313 U. S. 299 (1941). The Court has also recognized broad congressional power to legislate in connection with the elections of the President and Vice President. *Burroughs* v. *United States*, 290 U. S. 534 (1934). See Part III, *infra*.

dates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265, 272 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP* v. *Alabama,* 357 U. S. 449, 460 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee " 'freedom to associate with others for the common advancement of political beliefs and ideas,' " a freedom that encompasses " '[t]he right to associate with the political party of one's choice.' " *Kusper* v. *Pontikes,* 414 U. S. 51, 56, 57 (1973), quoted in *Cousins* v. *Wigoda,* 419 U. S. 477, 487 (1975).

It is with these principles in mind that we consider the primary contentions of the parties with respect to the Act's limitations upon the giving and spending of money in political campaigns. Those conflicting contentions could not more sharply define the basic issues before us. Appellees contend that what the Act regulates is conduct, and that its effect on speech and association is incidental at most. Appellants respond that contributions and expenditures are at the very core of political speech, and that the Act's limitations thus constitute restraints on First Amendment liberty that are both gross and direct.

In upholding the constitutional validity of the Act's contribution and expenditure provisions on the ground

that those provisions should be viewed as regulating conduct, not speech, the Court of Appeals relied upon *United States* v. *O'Brien,* 391 U. S. 367 (1968). See 171 U. S. App. D. C., at 191, 519 F. 2d, at 840. The *O'Brien* case involved a defendant's claim that the First Amendment prohibited his prosecution for burning his draft card because his act was " 'symbolic speech' " engaged in as a " 'demonstration against the war and against the draft.' " 391 U. S., at 376. On the assumption that "the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment," the Court sustained the conviction because it found "a sufficiently important governmental interest in regulating the nonspeech element" that was "unrelated to the suppression of free expression" and that had an "incidental restriction on alleged First Amendment freedoms . . . no greater than [was] essential to the furtherance of that interest." *Id.,* at 376–377. The Court expressly emphasized that *O'Brien* was not a case "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id.,* at 382.

We cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien.* The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment. See *Bigelow* v. *Virginia,* 421 U. S. 809,

820 (1975); *New York Times Co.* v. *Sullivan, supra,* at 266. For example, in *Cox* v. *Louisiana,* 379 U. S. 559 (1965), the Court contrasted picketing and parading with a newspaper comment and a telegram by a citizen to a public official. The parading and picketing activities were said to constitute conduct "intertwined with expression and association," whereas the newspaper comment and the telegram were described as a "pure form of expression" involving "free speech alone" rather than "expression mixed with particular conduct." *Id.,* at 563–564.

Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the governmental interests advanced in support of the Act involve "suppressing communication." The interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns. Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups. Unlike *O'Brien,* where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." 391 U. S., at 382.

Nor can the Act's contribution and expenditure limitations be sustained, as some of the parties suggest, by reference to the constitutional principles reflected in such

decisions as *Cox* v. *Louisiana, supra; Adderley* v. *Florida,* 385 U. S. 39 (1966); and *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). Those cases stand for the proposition that the government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication. See *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 209 (1975). In contrast to *O'Brien,* where the method of expression was held to be subject to prohibition, *Cox, Adderley,* and *Kovacs* involved place or manner restrictions on legitimate modes of expression—picketing, parading, demonstrating, and using a soundtruck. The critical difference between this case and those time, place, and manner cases is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed.[17]

[17] The nongovernmental appellees argue that just as the decibels emitted by a sound truck can be regulated consistently with the First Amendment, *Kovacs* v. *Cooper,* 336 U. S. 77 (1949), the Act may restrict the volume of dollars in political campaigns without impermissibly restricting freedom of speech. See Freund, Commentary in A. Rosenthal, Federal Regulation of Campaign Finance: Some Constitutional Questions 72 (1971). This comparison underscores a fundamental misconception. The decibel restriction upheld in *Kovacs* limited the *manner* of operating a soundtruck, but not the *extent* of its proper use. By contrast, the Act's dollar ceilings restrict the extent of the reasonable use of virtually every means of communicating information. As the *Kovacs* Court emphasized, the nuisance ordinance only barred soundtrucks from broadcasting "in a loud and raucous manner on the streets," 336 U. S., at 89, and imposed "no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers," or by soundtrucks operating at a reasonable volume. *Ibid.* See *Saia* v. *New York,* 334 U. S. 558, 561–562 (1948).

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.[18] This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate," 18 U. S. C. § 608 (e)(1) (1970 ed., Supp. IV), would appear to exclude all citizens and groups except candidates, political parties, and the institutional press[19] from any significant use of the most

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[18] Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.

[19] Political parties that fail to qualify a candidate for a position on the ballot are classified as "persons" and are subject to the $1,000 independent expenditure ceiling. See 18 U. S. C. §§ 591 (g), (i), 608 (e)(1), (f) (1970 ed., Supp. IV). Institutional press facilities owned or controlled by candidates or political parties are also subject to expenditure limits under the Act. See 18 U. S. C. §§ 591 (f)(4)(A), 608 (c)(2)(B), (e)(1) (1970 ed., Supp. IV).

Unless otherwise indicated all subsequent statutory citations in Part I of this opinion are to Title 18 of the United States Code, 1970 edition, Supplement IV.

effective modes of communication.[20] Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns [21] and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling.

By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free com-

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[20] The record indicates that, as of January 1, 1975, one full-page advertisement in a daily edition of a certain metropolitan newspaper cost $6,971.04—almost seven times the annual limit on expenditures "relative to" a particular candidate imposed on the vast majority of individual citizens and associations by § 608 (e)(1).

[21] The statistical findings of fact agreed to by the parties in the District Court indicate that 17 of 65 major-party senatorial candidates in 1974 spent more than the combined primary-election, general-election, and fundraising limitations imposed by the Act. §§ 591 (f)(4)(H), 608 (c)(1)(C), (D). The 1972 senatorial figures showed that 18 of 66 major-party candidates exceeded the Act's limitations. This figure may substantially underestimate the number of candidates who exceeded the limits provided in the Act, since the Act imposes separate ceilings for the primary election, the general election, and fundraising, and does not permit the limits to be aggregated. § 608 (c)(3). The data for House of Representatives elections are also skewed, since statistics reflect a combined $168,000 limit instead of separate $70,000 ceilings for primary and general elections with up to an additional 20% permitted for fundraising. §§ 591 (f)(4)(H), 608 (c)(1)(E). Only 22 of the 810 major-party House candidates in 1974 and 20 of the 816 major-party candidates in 1972 exceeded the $168,000 figure. Both Presidential candidates in 1972 spent in excess of the combined Presidential expenditure ceilings. §§ 608 (c)(1)(A), (B).

munication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.[22] A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations.[23] The overall effect of the Act's contribu-

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[22] Other factors relevant to an assessment of the "intensity" of the support indicated by a contribution include the contributor's financial ability and his past contribution history.

[23] Statistical findings agreed to by the parties reveal that approximately 5.1% of the $73,483,613 raised by the 1,161 candidates for Congress in 1974 was obtained in amounts in excess of $1,000. In 1974, two major-party senatorial candidates, Ramsey Clark and

tion ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy. By contrast, the Act's $1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. See *NAACP* v. *Alabama,* 357 U. S., at 460. The Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression "is simultaneously an interference with the freedom of [their] adherents," *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250 (1957) (plurality opinion). See *Cousins* v.

Senator Charles Mathias, Jr., operated large-scale campaigns on contributions raised under a voluntarily imposed $100 contribution limitation.

Wigoda, 419 U. S., at 487–488; *NAACP* v. *Button*, 371 U. S. 415, 431 (1963).

In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.

B. Contribution Limitations

1. The $1,000 Limitation on Contributions by Individuals and Groups to Candidates and Authorized Campaign Committees

Section 608 (b) provides, with certain limited exceptions, that "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000." The statute defines "person" broadly to include "an individual, partnership, committee, association, corporation or any other organization or group of persons." § 591 (g). The limitation reaches a gift, subscription, loan, advance, deposit of anything of value, or promise to give a contribution, made for the purpose of influencing a primary election, a Presidential preference primary, or a general election for any federal office.[24] §§ 591 (e)(1), (2). The

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[24] The Act exempts from the contribution ceiling the value of all volunteer services provided by individuals to a candidate or a political committee and excludes the first $500 spent by volunteers on certain categories of campaign-related activities. §§ 591 (e)(5)(A)–(D). See *infra*, at 36–37.

The Act does not define the phrase—"for the purpose of influencing" an election—that determines when a gift, loan, or advance constitutes a contribution. Other courts have given that phrase a narrow meaning to alleviate various problems in other contexts. See *United States* v. *National Comm. for Impeachment*, 469 F. 2d 1135, 1139–1142 (CA2 1972); *American Civil Liberties Union* v.

$1,000 ceiling applies regardless of whether the contribution is given to the candidate, to a committee authorized in writing by the candidate to accept contributions on his behalf, or indirectly via earmarked gifts passed through an intermediary to the candidate. §§ 608 (b)(4), (6).[25] The restriction applies to aggregate amounts contributed to the candidate for each election—with primaries, runoff elections, and general elections counted separately, and all Presidential primaries held in any calendar year treated together as a single election campaign. § 608 (b)(5).

Appellants contend that the $1,000 contribution ceiling unjustifiably burdens First Amendment freedoms, employs overbroad dollar limits, and discriminates against candidates opposing incumbent officeholders and against minor-party candidates in violation of the Fifth Amendment. We address each of these claims of invalidity in turn.

(a)

As the general discussion in Part I–A, *supra*, indicated, the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political associ-

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Jennings, 366 F. Supp. 1041, 1055–1057 (DC 1973) (three-judge court), vacated as moot *sub nom. Staats* v. *American Civil Liberties Union*, 422 U. S. 1030 (1975). The use of the phrase presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution. Funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution. In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act.

[25] Expenditures by persons and associations that are "authorized or requested" by the candidate or his agents are treated as contributions under the Act. See n. 53, *infra*.

ation. The Court's decisions involving associational freedoms establish that the right of association is a "basic constitutional freedom," *Kusper* v. *Pontikes,* 414 U. S., at 57, that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Shelton* v. *Tucker,* 364 U. S. 479, 486 (1960). See, *e. g., Bates* v. *Little Rock,* 361 U. S. 516, 522–523 (1960); *NAACP* v. *Alabama, supra,* at 460–461; *NAACP* v. *Button, supra,* at 452 (Harlan, J., dissenting). In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP* v. *Alabama, supra,* at 460–461. Yet, it is clear that "[n]either the right to associate nor the right to participate in political activities is absolute." *CSC* v. *Letter Carriers,* 413 U. S. 548, 567 (1973). Even a " 'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. *Cousins* v. *Wigoda, supra,* at 488; *NAACP* v. *Button, supra,* at 438; *Shelton* v. *Tucker, supra,* at 488.

Appellees argue that the Act's restrictions on large campaign contributions are justified by three governmental interests. According to the parties and *amici,* the primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office. Two "ancillary" interests underlying the Act are also allegedly furthered by the $1,000 limits on contributions. First, the limits serve to mute the voices of affluent persons and groups in the election

process and thereby to equalize the relative ability of all citizens to affect the outcome of elections.[26] Second, it is argued, the ceilings may to some extent act as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money.[27]

It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of

[26] Contribution limitations alone would not reduce the greater potential voice of affluent persons and well-financed groups, who would remain free to spend unlimited sums directly to promote candidates and policies they favor in an effort to persuade voters.

[27] Yet, a ceiling on the size of contributions would affect only indirectly the costs of political campaigns by making it relatively more difficult for candidates to raise large amounts of money. In 1974, for example, 94.9% of the funds raised by candidates for Congress came from contributions of $1,000 or less, see n. 23, *supra*. Presumably, some or all of the contributions in excess of $1,000 could have been replaced through efforts to raise additional contributions from persons giving less than $1,000. It is the Act's campaign expenditure limitations, § 608 (c), not the contribution limits, that directly address the overall scope of federal election spending.

representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.[28]

Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. In *CSC* v. *Letter Carriers, supra,* the Court found that the danger to "fair and effective government" posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees' right of partisan political association. Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U. S., at 565.[29]

Appellants contend that the contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with "proven and suspected *quid pro quo* arrangements." But laws making criminal

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[28] The Court of Appeals' opinion in this case discussed a number of the abuses uncovered after the 1972 elections. See 171 U. S. App. D. C., at 190–191, and nn. 36–38, 519 F. 2d, at 839–840, and nn. 36–38.

[29] Although the Court in *Letter Carriers* found that this interest was constitutionally sufficient to justify legislation prohibiting federal employees from engaging in certain partisan political activities, it was careful to emphasize that the limitations did not restrict an employee's right to express his views on political issues and candidates. 413 U. S., at 561, 568, 575–576, 579. See n. 54, *infra.*

the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion,[30] Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

The Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.[31] Significantly, the

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[30] The Act's disclosure provisions are discussed in Part II, *infra*.

[31] While providing significant limitations on the ability of all individuals and groups to contribute large amounts of money to candidates, the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents or the proliferation of political funds each authorized under the Act to contribute to candidates. As a prime example, § 610 permits corporations and labor unions to establish segregated funds to solicit voluntary contributions to be utilized for political purposes. Corporate and union resources without limitation may be employed to administer these funds and to solicit contributions from employees, stockholders, and union members. Each separate fund may contribute up to $5,000 per candidate per election so long as the fund qualifies as a political committee under § 608 (b)(2). See S. Rep. No. 93-1237, pp. 50-52

Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.

We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling.

(b)

Appellants' first overbreadth challenge to the contribution ceilings rests on the proposition that most large contributors do not seek improper influence over a candidate's position or an officeholder's action. Although the truth of that proposition may be assumed, it does not

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(1974); Federal Election Commission, Advisory Opinion 1975–23, 40 Fed. Reg. 56584 (1975).

The Act places no limit on the number of funds that may be formed through the use of subsidiaries or divisions of corporations, or of local and regional units of a national labor union. The potential for proliferation of these sources of contributions is not insignificant. In 1972, approximately 1,824,000 active corporations filed federal income tax returns. Internal Revenue Service, Preliminary Statistics of Income 1972, Corporation Income Tax Returns, p. 1 (Pub. 159 (11–74)). (It is not clear whether this total includes subsidiary corporations where the parent filed a consolidated return.) In the same year, 71,409 local unions were chartered by national unions. Department of Labor, Bureau of Labor Statistics, Directory of National Unions and Employee Associations 1973, p. 87 (1974).

The Act allows the maximum contribution to be made by each unit's fund provided the decision or judgment to contribute to particular candidates is made by the fund independently of control or direction by the parent corporation or the national or regional union. See S. Rep. No. 93–1237, pp. 51–52 (1974).

undercut the validity of the $1,000 contribution limitation. Not only is it difficult to isolate suspect contributions but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.

A second, related overbreadth claim is that the $1,000 restriction is unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder, especially in campaigns for statewide or national office. While the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for congressional and Presidential campaigns,[32] Congress' failure to engage in such fine tuning does not invalidate the legislation. As the Court of Appeals observed, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." 171 U. S. App. D. C., at 193, 519 F. 2d, at 842. Such distinctions in degree become significant only when they can be said to amount to differences in kind. Compare *Kusper* v. *Pontikes*, 414 U. S. 51 (1973), with *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973).

(c)

Apart from these First Amendment concerns, appellants argue that the contribution limitations work such an invidious discrimination between incumbents

[32] The Act's limitations applicable to both campaign expenditures and a candidate's personal expenditures on his own behalf are scaled to take account of the differences in the amounts of money required for congressional and Presidential campaigns. See §§ 608 (a) (1), (c) (1) (A)–(E).

and challengers that the statutory provisions must be declared unconstitutional on their face.[33] In considering this contention, it is important at the outset to note that the Act applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations. Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions. Cf. *James* v. *Valtierra*, 402 U. S. 137 (1971).

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[33] In this discussion, we address only the argument that the contribution limitations alone impermissibly discriminate against nonincumbents. We do not address the more serious argument that these limitations, in combination with the limitation on expenditures by individuals and groups, the limitation on a candidate's use of his own personal and family resources, and the overall ceiling on campaign expenditures invidiously discriminate against major-party challengers and minor-party candidates.

Since an incumbent is subject to these limitations to the same degree as his opponent, the Act, on its face, appears to be evenhanded. The appearance of fairness, however, may not reflect political reality. Although some incumbents are defeated in every congressional election, it is axiomatic that an incumbent usually begins the race with significant advantages. In addition to the factors of voter recognition and the status accruing to holding federal office, the incumbent has access to substantial resources provided by the Government. These include local and Washington offices, staff support, and the franking privilege. Where the incumbent has the support of major special-interest groups which have the flexibility described in n. 31, *supra*, and is further supported by the media, the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge.

However, since we decide in Part I–C, *infra*, that the ceilings on independent expenditures, on the candidate's expenditures from his personal funds, and on overall campaign expenditures are unconstitutional under the First Amendment, we need not express any opinion with regard to the alleged invidious discrimination resulting from the full sweep of the legislation as enacted.

There is no such evidence to support the claim that the contribution limitations in themselves discriminate against major-party challengers to incumbents. Challengers can and often do defeat incumbents in federal elections.[34] Major-party challengers in federal elections are usually men and women who are well known and influential in their community or State. Often such challengers are themselves incumbents in important local, state, or federal offices. Statistics in the record indicate that major-party challengers as well as incumbents are capable of raising large sums for campaigning.[35] Indeed, a small but nonetheless significant number of challengers have in recent elections outspent their incumbent rivals.[36] And, to the extent that incumbents generally are more likely than challengers to attract very large contributions, the Act's $1,000 ceiling has the practical effect of benefiting challengers as a class.[37] Contrary to the broad gen-

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[34] In 1974, for example, 40 major-party challengers defeated incumbent members of the House of Representatives in the general election. Four incumbent Senators were defeated by major-party challengers in the 1974 primary and general election campaigns.

[35] In the 1974 races for the House of Representatives, three of the 22 major-party candidates exceeding the combined expenditure limits contained in the Act were challengers to incumbents and nine were candidates in races not involving incumbents. The comparable 1972 statistics indicate that 14 of the 20 major-party candidates exceeding the combined limits were nonincumbents.

[36] In 1974, major-party challengers outspent House incumbents in 22% of the races, and 22 of the 40 challengers who defeated House incumbents outspent their opponents. In 1972, 24% of the major-party challengers in senatorial elections outspent their incumbent opponents. The 1974 statistics for senatorial contests reveal substantially greater financial dominance by incumbents.

[37] Of the $3,781,254 in contributions raised in 1974 by congressional candidates over and above a $1,000-per-contributor limit, almost twice as much money went to incumbents as to major-party challengers.

eralization drawn by the appellants, the practical impact of the contribution ceilings in any given election will clearly depend upon the amounts in excess of the ceilings that, for various reasons, the candidates in that election would otherwise have received and the utility of these additional amounts to the candidates. To be sure, the limitations may have a significant effect on particular challengers or incumbents, but the record provides no basis for predicting that such adventitious factors will invariably and invidiously benefit incumbents as a class.[38] Since the danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents, Congress had ample justification for imposing the same fundraising constraints upon both.

The charge of discrimination against minor-party and independent candidates is more troubling, but the record provides no basis for concluding that the Act invidiously disadvantages such candidates. As noted above, the Act on its face treats all candidates equally with regard to contribution limitations. And the restriction would appear to benefit minor-party and independent candidates relative to their major-party opponents because major-party candidates receive far more money in large contributions.[39] Although there is some

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[38] Appellants contend that the Act discriminates against challengers, because, while it limits contributions to all candidates, the Government makes available other material resources to incumbents. See n. 33, *supra*. Yet, taking cognizance of the advantages and disadvantages of incumbency, there is little indication that the $1,000 contribution ceiling will consistently harm the prospects of challengers relative to incumbents.

[39] Between September 1, 1973, and December 31, 1974, major-party candidates for the House and Senate raised over $3,725,000 in contributions over and above $1,000 compared to $55,000 raised by minor-party candidates in amounts exceeding the $1,000 contribution limit.

force to appellants' response that minor-party candidates are primarily concerned with their ability to amass the resources necessary to reach the electorate rather than with their funding position relative to their major-party opponents, the record is virtually devoid of support for the claim that the $1,000 contribution limitation will have a serious effect on the initiation and scope of minor-party and independent candidacies.[40] Moreover, any at-

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[40] Appellant Libertarian Party, according to estimates of its national chairman, has received only 10 contributions in excess of $1,000 out of a total of 4,000 contributions. Even these 10 contributions would have been permissible under the Act if the donor did not earmark the funds for a particular candidate and did not exceed the overall $25,000 contribution ceiling for the calendar year. See § 608 (b). Similarly, appellants Conservative Victory Fund and American Conservative Union have received only an insignificant portion of their funding through contributions in excess of $1,000. The affidavit of the executive director of the Conservative Victory Fund indicates that in 1974, a typical fundraising year, the Fund received approximately $152,000 through over 9,500 individual contributions. Only one of the 9,500 contributions, an $8,000 contribution earmarked for a particular candidate, exceeded $1,000. In 1972, the Fund received only three contributions in excess of $1,000, all of which might have been legal under the Act if not earmarked. And between April 7, 1972, and February 28, 1975, the American Conservative Union did not receive any aggregate contributions exceeding $1,000. Moreover, the Committee for a Constitutional Presidency—McCarthy '76, another appellant, engaged in a concerted effort to raise contributions in excess of $1,000 before the effective date of the Act but obtained only five contributions in excess of $1,000.

Although appellants claim that the $1,000 ceiling governing contributions to candidates will prevent the acquisition of seed money necessary to launch campaigns, the absence of experience under the Act prevents us from evaluating this assertion. As appellees note, it is difficult to assess the effect of the contribution ceiling on the acquisition of seed money since candidates have not previously had to make a concerted effort to raise start-up funds in small amounts.

tempt to exclude minor parties and independents en masse from the Act's contribution limitations overlooks the fact that minor-party candidates may win elective office or have a substantial impact on the outcome of an election.[41]

In view of these considerations, we conclude that the impact of the Act's $1,000 contribution limitation on major-party challengers and on minor-party candidates does not render the provision unconstitutional on its face.

2. The $5,000 Limitation on Contributions by Political Committees

Section 608 (b)(2) permits certain committees, designated as "political committees," to contribute up to $5,000 to any candidate with respect to any election for federal office. In order to qualify for the higher contribution ceiling, a group must have been registered with the Commission as a political committee under 2 U. S. C. § 433 (1970 ed., Supp. IV) for not less than six months, have received contributions from more than 50 persons, and, except for state political party organizations, have contributed to five or more candidates for federal office. Appellants argue that these qualifications unconstitutionally discriminate against *ad hoc* organizations in favor of established interest groups and impermissibly burden free association. The argument is without merit. Rather than undermining freedom of association, the basic provision enhances the opportunity of bona fide groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of preventing indi-

[41] Appellant Buckley was a minor-party candidate in 1970 when he was elected to the United States Senate from the State of New York.

viduals from evading the applicable contribution limitations by labeling themselves committees.

3. Limitations on Volunteers' Incidental Expenses

The Act excludes from the definition of contribution "the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee." § 591 (e)(5)(A). Certain expenses incurred by persons in providing volunteer services to a candidate are exempt from the $1,000 ceiling only to the extent that they do not exceed $500. These expenses are expressly limited to (1) "the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities," § 591 (e)(5)(B); (2) "the sale of any food or beverage by a vendor for use in a candidate's campaign at a charge [at least equal to cost but] less than the normal comparable charge," § 591 (e)(5)(C); and (3) "any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate," § 591 (e)(5)(D).

If, as we have held, the basic contribution limitations are constitutionally valid, then surely these provisions are a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates. The expenditure of resources at the candidate's direction for a fundraising event at a volunteer's residence or the provision of in-kind assistance in the form of food or beverages to be resold to raise funds or consumed by the participants in such an event provides material financial assistance to a candidate. The ulti-

mate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the fund-raising event or the food. Similarly, travel undertaken as a volunteer at the direction of the candidate or his staff is an expense of the campaign and may properly be viewed as a contribution if the volunteer absorbs the fare. Treating these expenses as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an avenue of abuse [42] without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign.[43]

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[42] Although expenditures incidental to volunteer services would appear self-limiting, it is possible for a worker in a candidate's campaign to generate substantial travel expenses. An affidavit submitted by Stewart Mott, an appellant, indicates that he "expended some $50,000 for personal expenses" in connection with Senator McGovern's 1972 Presidential campaign.

[43] The Act contains identical, parallel provisions pertaining to incidental volunteer expenses under the definitions of contribution and expenditure. Compare §§ 591 (e)(5)(B)–(D) with §§ 591 (f)(4)(D), (E). The definitions have two effects. First, volunteer expenses that are counted as contributions by the volunteer would also constitute expenditures by the candidate's campaign. Second, some volunteer expenses would qualify as contributions whereas others would constitute independent expenditures. The statute distinguishes between independent expenditures by individuals and campaign expenditures on the basis of whether the candidate, an authorized committee of the candidate, or an agent of the candidate "authorized or requested" the expenditure. See §§ 608 (c)(2)(B)(ii), (e)(1); S. Rep. No. 93–689, p. 18 (1974); H. R. Rep. No. 93–1239, p. 6 (1974). As a result, only travel that is "authorized or requested" by the candidate or his agents would involve incidental expenses chargeable against the volunteer's contribution limit and the candidate's expenditure ceiling. See n. 53, *infra*. Should a person independently travel across the country to participate in a campaign, any unreimbursed travel expenses would not be treated as a contribution. This interpretation is not only consistent with the statute

4. The $25,000 Limitation on Total Contributions During any Calendar Year

In addition to the $1,000 limitation on the nonexempt contributions that an individual may make to a particular candidate for any single election, the Act contains an overall $25,000 limitation on total contributions by an individual during any calendar year. § 608 (b)(3). A contribution made in connection with an election is considered, for purposes of this subsection, to be made in the year the election is held. Although the constitutionality of this provision was drawn into question by appellants, it has not been separately addressed at length by the parties. The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

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and the legislative history but is also necessary to avoid the administrative chaos that would be produced if each volunteer and candidate had to keep track of amounts spent on unsolicited travel in order to comply with the Act's contribution and expenditure ceilings and the reporting and disclosure provisions. The distinction between contributions and expenditures is also discussed at n. 53, *infra*, and in Part II–C–2, *infra*.

C. Expenditure Limitations

The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. The most drastic of the limitations restricts individuals and groups, including political parties that fail to place a candidate on the ballot,[44] to an expenditure of $1,000 "relative to a clearly identified candidate during a calendar year." § 608 (e)(1). Other expenditure ceilings limit spending by candidates, § 608 (a), their campaigns, § 608 (c), and political parties in connection with election campaigns, § 608 (f). It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms." *Williams* v. *Rhodes*, 393 U. S. 23, 32 (1968).

1. The $1,000 Limitation on Expenditures "Relative to a Clearly Identified Candidate"

Section 608 (e)(1) provides that "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." [45] The plain effect of § 608 (e)(1) is to

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[44] See n. 19, *supra*.

[45] The same broad definition of "person" applicable to the contribution limitations governs the meaning of "person" in § 608 (e)(1). The statute provides some limited exceptions through various exclusions from the otherwise comprehensive definition of "expenditure." See § 591 (f). The most important exclusions are: (1) "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate," § 591 (f)(4)

prohibit all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views "relative to a clearly identified candidate" through means that entail aggregate expenditures of more than $1,000 during a calendar year. The provision, for example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement "relative to a clearly identified candidate" in a major metropolitan newspaper.[46]

Before examining the interests advanced in support of § 608 (e)(1)'s expenditure ceiling, consideration must be given to appellants' contention that the provision is unconstitutionally vague.[47] Close examination of the

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(A), and (2) "any communication by any membership organization or corporation to its members or stockholders, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any person to Federal office," § 591 (f)(4)(C). In addition, the Act sets substantially higher limits for personal expenditures by a candidate in connection with his own campaign, § 608 (a), expenditures by national and state committees of political parties that succeed in placing a candidate on the ballot, §§ 591 (i), 608 (f), and total campaign expenditures by candidates, § 608 (c).

[46] Section 608 (i) provides that any person convicted of exceeding any of the contribution or expenditure limitations "shall be fined not more than $25,000 or imprisoned not more than one year, or both."

[47] Several of the parties have suggested that problems of ambiguity regarding the application of § 608 (e)(1) to specific campaign speech could be handled by requesting advisory opinions from the Commission. While a comprehensive series of advisory opinions or a rule delineating what expenditures are "relative to a clearly identified candidate" might alleviate the provision's vagueness problems, reliance on the Commission is unacceptable because the vast majority of individuals and groups subject to criminal sanctions for violating § 608 (e)(1) do not have a right to obtain an advisory opinion from the Commission. See 2 U. S. C. § 437f (1970 ed., Supp. IV). Section 437f (a) of Title 2 accords only candidates, federal

specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests. See *Smith* v. *Goguen*, 415 U. S. 566, 573 (1974); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 287–288 (1961); *Smith* v. *California*, 361 U. S. 147, 151 (1959).[48] The test is whether the language of § 608 (e)(1) affords the "[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S., at 438.

The key operative language of the provision limits "any expenditure . . . relative to a clearly identified candidate." Although "expenditure," "clearly identified," and "candidate" are defined in the Act, there is no definition clarifying what expenditures are "relative to" a candidate. The use of so indefinite a phrase as "relative to" a candidate fails to clearly mark the boundary between permissible and impermissible speech, unless other portions of § 608 (e)(1) make sufficiently explicit the range of expendi-

officeholders, and political committees the right to request advisory opinions and directs that the Commission "shall render an advisory opinion, in writing, within a reasonable time" concerning specific planned activities or transactions of any such individual or committee. The powers delegated to the Commission thus do not assure that the vagueness concerns will be remedied prior to the chilling of political discussion by individuals and groups in this or future election years.

[48] In such circumstances, vague laws may not only "trap the innocent by not providing fair warning" or foster "arbitrary and discriminatory application" but also operate to inhibit protected expression by inducing "citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972), quoting *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964), quoting *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963).

tures covered by the limitation. The section prohibits "any expenditure . . . relative to a clearly identified candidate during a calendar year which, *when added to all other expenditures . . . advocating the election or defeat of such candidate,* exceeds $1,000." (Emphasis added.) This context clearly permits, if indeed it does not require, the phrase "relative to" a candidate to be read to mean "advocating the election or defeat of" a candidate.[49]

But while such a construction of § 608 (e)(1) refocuses the vagueness question, the Court of Appeals was mistaken in thinking that this construction eliminates the problem of unconstitutional vagueness altogether. 171 U. S. App. D. C., at 204, 519 F. 2d, at 853. For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[50] In an analo-

[49] This interpretation of "relative to" a clearly identified candidate is supported by the discussion of § 608 (e)(1) in the Senate Report, S. Rep. No. 93–689, p. 19 (1974), the House Report, H. R. Rep. No. 93–1239, p. 7 (1974), the Conference Report, S. Conf. Rep. No. 93–1237, pp. 56–57 (1974), and the opinion of the Court of Appeals, 171 U. S. App. D. C., at 203–204, 519 F. 2d, at 852–853.

[50] In connection with another provision containing the same advocacy language appearing in § 608 (e)(1), the Court of Appeals concluded:

"Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections." 171 U. S. App. D. C., at 226, 519 F. 2d, at 875.

gous context, this Court in *Thomas* v. *Collins*, 323 U. S. 516 (1945), observed:

> "[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Id.*, at 535.

See also *United States* v. *Auto. Workers*, 352 U. S. 567, 595–596 (1957) (Douglas, J., dissenting); *Gitlow* v. *New York*, 268 U. S. 652, 673 (1925) (Holmes, J., dissenting).

The constitutional deficiencies described in *Thomas* v. *Collins* can be avoided only by reading § 608 (e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of "clearly identified" in § 608 (e)(2) requires that an explicit and unambiguous reference to the candidate appear as part of the communication.[51] This

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[51] Section 608 (e)(2) defines "clearly identified" to require that the candidate's name, photograph or drawing, or other unambiguous reference to his identity appear as part of the communication. Such other unambiguous reference would include use of the candidate's initials (*e. g.*, FDR), the candidate's nickname (*e. g.*, Ike), his office (*e. g.*, the President or the Governor of Iowa), or his status as a

is the reading of the provision suggested by the nongovernmental appellees in arguing that "[f]unds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat are thus not covered." We agree that in order to preserve the provision against invalidation on vagueness grounds, § 608 (e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.[52]

We turn then to the basic First Amendment question—whether § 608 (e)(1), even as thus narrowly and explicitly construed, impermissibly burdens the constitutional right of free expression. The Court of Appeals summarily held the provision constitutionally valid on the ground that "section 608 (e) is a loophole-closing provision only" that is necessary to prevent circumvention of the contribution limitations. 171 U. S. App. D. C., at 204, 519 F. 2d, at 853. We cannot agree.

The discussion in Part I–A, *supra*, explains why the Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations. The markedly greater burden on basic freedoms caused by § 608 (e)(1) thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of § 608 (e)(1) turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limita-

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candidate (*e. g.*, the Democratic Presidential nominee, the senatorial candidate of the Republican Party of Georgia).

[52] This construction would restrict the application of § 608 (e)(1) to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

tions on core First Amendment rights of political expression.

We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify § 608 (e)(1)'s ceiling on independent expenditures. First, assuming, *arguendo,* that large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions, § 608 (e)(1) does not provide an answer that sufficiently relates to the elimination of those dangers. Unlike the contribution limitations' total ban on the giving of large amounts of money to candidates, § 608 (e)(1) prevents only some large expenditures. So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office. Cf. *Mills* v. *Alabama,* 384 U. S., at 220.

Second, quite apart from the shortcomings of § 608 (e)

(1) in preventing any abuses generated by large independent expenditures, the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. The parties defending § 608 (e)(1) contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act.[53] Section 608 (b)'s

[53] Section 608 (e)(1) does not apply to expenditures "on behalf of a candidate" within the meaning of § 608 (c)(2)(B). The latter subsection provides that expenditures "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate" are to be treated as expenditures of the candidate and contributions by the person or group making the expenditure. The House and Senate Reports provide guidance in differentiating individual expenditures that are contributions and candidate expenditures under § 608 (c)(2)(B) from those treated as independent expenditures subject to the § 608 (e)(1) ceiling. The House Report speaks of independent expenditures as costs "incurred without the request or consent of a candidate or his agent." H. R. Rep. No. 93–1239, p. 6 (1974). The Senate Report addresses the issue in greater detail. It provides an example illustrating the distinction between "authorized or requested" expenditures excluded from § 608 (e)(1) and independent expenditures governed by § 608 (e)(1):

"[A] person might purchase billboard advertisements endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agent's [*sic*] that would constitute an 'independent expenditure on behalf of a candidate'

contribution ceilings rather than § 608 (e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, § 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608 (e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming

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under section 614 (c) of the bill. The person making the expenditure would have to report it as such.

"However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate—just as if there had been a direct contribution enabling the candidate to place the advertisement, himself. It would be so reported by both." S. Rep. No. 93–689, p. 18 (1974).

The Conference substitute adopted the provision of the Senate bill dealing with expenditures by any person "authorized or requested" to make an expenditure by the candidate or his agents. S. Conf. Rep. No. 93–1237, p. 55 (1974). In view of this legislative history and the purposes of the Act, we find that the "authorized or requested" standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions subject to the limitations set forth in § 608 (b).

the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression. For the First Amendment right to "'speak one's mind . . . on all public institutions'" includes the right to engage in "'vigorous advocacy' no less than 'abstract discussion.'" *New York Times Co.* v. *Sullivan*, 376 U. S., at 269, quoting *Bridges* v. *California*, 314 U. S. 252, 270 (1941), and *NAACP* v. *Button*, 371 U. S., at 429. Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.[54]

It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608 (e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in

[54] Appellees mistakenly rely on this Court's decision in *CSC* v. *Letter Carriers*, as supporting § 608(e)(1)'s restriction on the spending of money to advocate the election or defeat of a particular candidate. In upholding the Hatch Act's broad restrictions on the associational freedoms of federal employees, the Court repeatedly emphasized the statutory provision and corresponding regulation permitting an employee to "'[e]xpress his opinion as an individual privately and publicly on political subjects and candidates.'" 413 U. S., at 579, quoting 5 CFR § 733.111 (a)(2). See 413 U. S., at 561, 568, 575–576. Although the Court "unhesitatingly" found that a statute prohibiting federal employees from engaging in a wide variety of "partisan political conduct" would "unquestionably be valid," it carefully declined to endorse provisions threatening political expression. See *id.*, at 556, 579–581. The Court did not rule on the constitutional questions presented by the regulations forbidding partisan campaign endorsements through the media and speechmaking to political gatherings because it found that these restrictions did not "make the statute substantially overbroad and so invalid on its face." *Id.*, at 581.

order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co.* v. *Sullivan, supra,* at 266, 269, quoting *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945), and *Roth* v. *United States,* 354 U. S., at 484. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. Cf. *Eastern R. Conf.* v. *Noerr Motors,* 365 U. S. 127, 139 (1961).[55]

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[55] Neither the voting rights cases nor the Court's decision upholding the Federal Communications Commission's fairness doctrine lends support to appellees' position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society.

Cases invalidating governmentally imposed wealth restrictions on the right to vote or file as a candidate for public office rest on the conclusion that wealth "is not germane to one's ability to participate intelligently in the electoral process" and is therefore an insufficient basis on which to restrict a citizen's fundamental right to vote. *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663, 668 (1966). See *Lubin* v. *Panish,* 415 U. S. 709 (1974); *Bullock* v. *Carter,* 405 U. S. 134 (1972); *Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970). These voting cases and the reapportionment decisions serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography. But the principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression. Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.

In *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969), the Court upheld the political-editorial and personal-attack portions of

The Court's decisions in *Mills* v. *Alabama*, 384 U. S. 214 (1966), and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), held that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment. In *Mills*, the Court addressed the question whether "a State, consistently with the United States Constitution, can make it a crime for the editor of a daily newspaper to write and publish an editorial *on election day* urging people to vote a certain way on issues submitted to them." 384 U. S., at 215 (emphasis in original). We held that "no test of reasonableness can save [such] a state law from invalidation as a violation of the First Amendment." *Id.*, at 220. Yet the prohibition of election-day editorials invalidated in *Mills* is clearly a lesser intrusion on constitutional freedom than a $1,000 limitation on the amount of money any person or association can spend *during an entire election year* in advocating the election or defeat of a candidate for public office. More recently in *Tornillo*, the Court held that Florida could not constitutionally require a news-

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the Federal Communications Commission's fairness doctrine. That doctrine requires broadcast licensees to devote programing time to the discussion of controversial issues of public importance and to present both sides of such issues. *Red Lion* "makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case," by demonstrating that "'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" *Columbia Broadcasting* v. *Democratic Comm.*, 412 U. S. 94, 101 (1973), quoting *Red Lion Broadcasting Co., supra*, at 388. *Red Lion* therefore undercuts appellees' claim that § 608 (e) (1)'s limitations may permissibly restrict the First Amendment rights of individuals in this "traditional free speech case." Moreover, in contrast to the undeniable effect of § 608 (e) (1), the presumed effect of the fairness doctrine is one of "enhancing the volume and quality of coverage" of public issues. 395 U. S., at 393.

paper to make space available for a political candidate to reply to its criticism. Yet under the Florida statute, every newspaper was free to criticize any candidate as much as it pleased so long as it undertook the modest burden of printing his reply. See 418 U. S., at 256–257. The legislative restraint involved in *Tornillo* thus also pales in comparison to the limitations imposed by § 608 (e)(1).[56]

For the reasons stated, we conclude that § 608 (e)(1)'s independent expenditure limitation is unconstitutional under the First Amendment.

2. Limitation on Expenditures by Candidates from Personal or Family Resources

The Act also sets limits on expenditures by a candidate "from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year." § 608 (a)(1). These ceilings vary from $50,000 for Presidential or Vice Presidential candidates to $35,000 for senatorial candidates, and $25,000 for most candidates for the House of Representatives.[57]

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[56] The Act exempts most elements of the institutional press, limiting only expenditures by institutional press facilities that are owned or controlled by candidates and political parties. See § 591 (f)(4)(A). But, whatever differences there may be between the constitutional guarantees of a free press and of free speech, it is difficult to conceive of any principled basis upon which to distinguish § 608 (e)(1)'s limitations upon the public at large and similar limitations imposed upon the press specifically.

[57] The $35,000 ceiling on expenditures by candidates for the Senate also applies to candidates for the House of Representatives from States entitled to only one Representative. § 608 (a)(1)(B).

The Court of Appeals treated § 608 (a) as relaxing the $1,000-per-candidate contribution limitation imposed by § 608 (b)(1) so as to permit any member of the candidate's immediate family—spouse, child, grandparent, brother, sister, or spouse of such persons—to

The ceiling on personal expenditures by candidates on their own behalf, like the limitations on independent expenditures contained in § 608 (e)(1), imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression.[58] The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the un-

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contribute up to the $25,000 overall annual contribution ceiling to the candidate. See 171 U. S. App. D. C., at 205, 519 F. 2d, at 854. The Commission has recently adopted a similar interpretation of the provision. See Federal Election Commission, Advisory Opinion 1975–65 (Dec. 5, 1975), 40 Fed. Reg. 58393. However, both the Court of Appeals and the Commission apparently overlooked the Conference Report accompanying the final version of the Act which expressly provides for a contrary interpretation of § 608 (a):

"It is the intent of the conferees that members of the immediate family of any candidate shall be subject to the contribution limitations established by this legislation. If a candidate for the office of Senator, for example, already is in a position to exercise control over funds of a member of his immediate family before he becomes a candidate, then he could draw upon these funds up to the limit of $35,000. If, however, the candidate did not have access to or control over such funds at the time he became a candidate, the immediate family member would not be permitted to grant access or control to the candidate in amounts up to $35,000, if the immediate family member intends that such amounts are to be used in the campaign of the candidate. The immediate family member would be permitted merely to make contributions to the candidate in amounts not greater than $1,000 for each election involved." S. Conf. Rep. No. 93–1237, p. 58 (1974).

[58] The Court of Appeals evidently considered the personal funds expended by the candidate on his own behalf as a contribution rather than an expenditure. See 171 U. S. App. D. C., at 205, 519 F. 2d, at 854. However, unlike a person's contribution to a candidate, a candidate's expenditure of his personal funds directly facilitates his own political speech.

fettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty," *Whitney* v. *California,* 274 U. S. 357, 375 (1927) (concurring opinion), applies with special force to candidates for public office. Section 608 (a)'s ceiling on personal expenditures by a candidate in furtherance of his own candidacy thus clearly and directly interferes with constitutionally protected freedoms.

The primary governmental interest served by the Act—the prevention of actual and apparent corruption of the political process—does not support the limitation on the candidate's expenditure of his own personal funds. As the Court of Appeals concluded: "Manifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family." 171 U. S. App. D. C., at 206, 519 F. 2d, at 855. Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed.[59]

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[59] The legislative history of the Act clearly indicates that § 608 (a) was not intended to suspend the application of the $1,000 contribution limitation of § 608 (b) (1) for members of the candidate's immediate family. See n. 57, *supra.* Although the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members, we cannot say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors.

The limitation on a candidate's expenditure of his own funds differs markedly from a limitation on family contributions both in the absence of any threat of corruption and the presence of a legis-

The ancillary interest in equalizing the relative financial resources of candidates competing for elective office, therefore, provides the sole relevant rationale for § 608 (a)'s expenditure ceiling. That interest is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights. First, the limitation may fail to promote financial equality among candidates. A candidate who spends less of his personal resources on his campaign may nonetheless outspend his rival as a result of more successful fundraising efforts. Indeed, a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign. Second, and more fundamentally, the First Amendment simply cannot tolerate § 608 (a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that § 608 (a)'s restriction on a candidate's personal expenditures is unconstitutional.

3. Limitations on Campaign Expenditures

Section 608 (c) places limitations on overall campaign expenditures by candidates seeking nomination for election and election to federal office.[60] Presidential candidates may spend $10,000,000 in seeking nomination for office and an additional $20,000,000 in the general election campaign. §§ 608 (c)(1)(A), (B).[61]

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lative restriction on the candidate's ability to fund his own communication with the voters.

[60] Expenditures made by an authorized committee of the candidate or any other agent of the candidate as well as any expenditure by any other person that is "authorized or requested" by the candidate or his agent are charged against the candidate's spending ceiling. § 608 (c)(2)(B).

[61] Expenditures made by or on behalf of a Vice Presidential candidate of a political party are considered to have been made by or on behalf of the party's Presidential candidate. § 608 (c)(2)(A).

The ceiling on senatorial campaigns is pegged to the size of the voting-age population of the State with minimum dollar amounts applicable to campaigns in States with small populations. In senatorial primary elections, the limit is the greater of eight cents multiplied by the voting-age population or $100,000, and in the general election the limit is increased to 12 cents multiplied by the voting-age population or $150,000. §§608 (c)(1)(C), (D). The Act imposes blanket $70,000 limitations on both primary campaigns and general election campaigns for the House of Representatives with the exception that the senatorial ceiling applies to campaigns in States entitled to only one Representative. §§ 608 (c)(1)(C)–(E). These ceilings are to be adjusted upwards at the beginning of each calendar year by the average percentage rise in the consumer price index for the 12 preceding months. § 608 (d).[62]

No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by § 608 (c)'s campaign expenditure limitations. The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions. The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by § 608 (c)'s campaign expenditure ceilings. The Court of Appeals' assertion that the expenditure restrictions are necessary to reduce the incentive to circumvent direct contribution limits is not persuasive. See 171 U. S.

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[62] The campaign ceilings contained in § 608 (c) would have required a reduction in the scope of a number of previous congressional campaigns and substantially limited the overall expenditures of the two major-party Presidential candidates in 1972. See n. 21, *supra*.

App. D. C., at 210, 519 F. 2d, at 859. There is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions. Extensive reporting, auditing, and disclosure requirements applicable to both contributions and expenditures by political campaigns are designed to facilitate the detection of illegal contributions. Moreover, as the Court of Appeals noted, the Act permits an officeholder or successful candidate to retain contributions in excess of the expenditure ceiling and to use these funds for "any other lawful purpose." 2 U. S. C. § 439a (1970 ed., Supp. IV). This provision undercuts whatever marginal role the expenditure limitations might otherwise play in enforcing the contribution ceilings.

The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns. Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support.[63] There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.[64] Moreover, the equalization of permissible campaign ex-

[63] This normal relationship may not apply where the candidate devotes a large amount of his personal resources to his campaign.

[64] As an opinion dissenting in part from the decision below noted: "If a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication? I know of none." 171 U. S. App. D. C., at 268, 519 F. 2d, at 917 (Tamm, J.).

penditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.

The campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns. Appellees and the Court of Appeals stressed statistics indicating that spending for federal election campaigns increased almost 300% between 1952 and 1972 in comparison with a 57.6% rise in the consumer price index during the same period. Appellants respond that during these years the rise in campaign spending lagged behind the percentage increase in total expenditures for commercial advertising and the size of the gross national product. In any event, the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.[65]

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[65] For the reasons discussed in Part III, *infra*, Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

For these reasons we hold that § 608 (c) is constitutionally invalid.[66]

In sum, the provisions of the Act that impose a $1,000 limitation on contributions to a single candidate, § 608 (b)(1), a $5,000 limitation on contributions by a political committee to a single candidate, § 608 (b)(2), and a $25,000 limitation on total contributions by an individual during any calendar year, § 608 (b)(3), are constitutionally valid. These limitations, along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions. The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion. By contrast, the First Amendment requires the invalidation of the Act's independent expenditure ceiling, § 608 (e)(1), its limitation on a candidate's expenditures from his own personal funds, § 608 (a), and its ceilings on overall campaign expenditures, § 608 (c). These provisions place substantial and direct restrictions

[66] Subtitle H of the Internal Revenue Code also established separate limitations for general election expenditures by national and state committees of political parties, § 608 (f), and for national political party conventions for the nomination of Presidential candidates. 26 U. S. C. § 9008 (d) (1970 ed., Supp. IV). Appellants do not challenge these ceilings on First Amendment grounds. Instead, they contend that the provisions discriminate against independent candidates and regional political parties without national committees because they permit additional spending by political parties with national committees. Our decision today holding § 608 (e)(1)'s independent expenditure limitation unconstitutional and § 608 (c)'s campaign expenditure ceilings unconstitutional removes the predicate for appellants' discrimination claim by eliminating any alleged advantage to political parties with national committees.

on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.[67]

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[67] Accordingly, the answers to the certified constitutional questions pertaining to the Act's contribution and expenditure limitations are as follows:

3. Does any statutory limitation, or do the particular limitations in the challenged statutes, on the amounts that individuals or organizations may contribute or expend in connection with elections for federal office violate the rights of one or more of the plaintiffs under the First, Fifth, or Ninth Amendment or the Due Process Clause of the Fifth Amendment of the Constitution of the United States?

(a) Does 18 U. S. C. § 608 (a) (1970 ed., Supp. IV) violate such rights, in that it forbids a candidate or the members of his immediate family from expending personal funds in excess of the amounts specified in 18 U. S. C. § 608 (a) (1) (1970 ed., Supp. IV)?

Answer: YES.

(b) Does 18 U. S. C. § 608 (b) (1970 ed., Supp. IV) violate such rights, in that it forbids the solicitation, receipt or making of contributions on behalf of political candidates in excess of the amounts specified in 18 U. S. C. § 608 (b) (1970 ed., Supp. IV)?

Answer: NO.

(c) Do 18 U. S. C. §§ 591 (e) and 608 (b) (1970 ed., Supp. IV) violate such rights, in that they limit the incidental expenses which volunteers working on behalf of political candidates may incur to the amounts specified in 18 U. S. C. §§ 591 (e) and 608 (b) (1970 ed., Supp. IV)?

Answer: NO.

(d) Does 18 U. S. C. § 608 (e) (1970 ed., Supp. IV) violate such rights, in that it limits to $1,000 the independent (not on behalf of a candidate) expenditures of any person relative to an identified candidate?

Answer: YES.

(e) Does 18 U. S. C. § 608 (f) (1970 ed., Supp. IV) violate such rights, in that it limits the expenditures of national or state committees of political parties in connection with general election campaigns for federal office?

Answer: NO, as to the Fifth Amendment challenge advanced by appellants.

(f) Does § 9008 of the Internal Revenue Code of 1954 violate

II. REPORTING AND DISCLOSURE REQUIREMENTS

Unlike the limitations on contributions and expenditures imposed by 18 U. S. C. § 608 (1970 ed., Supp. IV), the disclosure requirements of the Act, 2 U. S. C. § 431 *et seq.* (1970 ed., Supp. IV),[68] are not challenged by appellants as *per se* unconstitutional restrictions on the exercise of First Amendment freedoms of speech and association.[69] Indeed, appellants argue that "narrowly drawn disclosure requirements are the proper solution to virtually all of the evils Congress sought to remedy." Brief for Appellants 171. The particular requirements

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such rights, in that it limits the expenditures of the national committee of a party with respect to presidential nominating conventions?

Answer: NO, as to the Fifth Amendment challenge advanced by appellants.

(h) Does 18 U. S. C. § 608 (b)(2) (1970 ed., Supp. IV) violate such rights, in that it excludes from the definition of "political committee" committees registered for less than the period of time prescribed in the statute?

Answer: NO.

4. Does any statutory limitation, or do the particular limitations in the challenged statutes, on the amounts that candidates for elected federal office may expend in their campaigns violate the rights of one or more of the plaintiffs under the First or Ninth Amendment or the Due Process Clause of the Fifth Amendment?

(a) Does 18 U. S. C. § 608 (c) (1970 ed., Supp. IV) violate such rights, in that it forbids expenditures by candidates for federal office in excess of the amounts specified in 18 U. S. C. § 608 (c) (1970 ed., Supp. IV)?

Answer: YES.

[68] Unless otherwise indicated, all statutory citations in Part II of this opinion are to Title 2 of the United States Code, 1970 edition, Supplement IV.

[69] Appellants do contend that there should be a blanket exemption from the disclosure provisions for minor parties. See Part II–B–2, *infra*.

embodied in the Act are attacked as overbroad—both in their application to minor-party and independent candidates and in their extension to contributions as small as $11 or $101. Appellants also challenge the provision for disclosure by those who make independent contributions and expenditures, § 434 (e). The Court of Appeals found no constitutional infirmities in the provisions challenged here.[70] We affirm the determination on overbreadth and hold that § 434 (e), if narrowly construed, also is within constitutional bounds.

The first federal disclosure law was enacted in 1910. Act of June 25, 1910, c. 392, 36 Stat. 822. It required political committees, defined as national committees and national congressional campaign committees of parties, and organizations operating to influence congressional elections in two or more States, to disclose names of all contributors of $100 or more; identification of recipients of expenditures of $10 or more was also required. §§ 1, 5–6, 36 Stat. 822–824. Annual expenditures of $50 or more "for the purpose of influencing or controlling, in two or more States, the result of" a congressional election had to be reported independently if they were not made through a political committee. § 7, 36 Stat. 824. In 1911 the Act was revised to include prenomination transactions such as those involved in conventions and primary campaigns. Act of Aug. 19, 1911, § 2, 37 Stat. 26. See *United States* v. *Auto. Workers*, 352 U. S., at 575–576.

Disclosure requirements were broadened in the Federal Corrupt Practices Act of 1925 (Title III of the Act of Feb. 28, 1925), 43 Stat. 1070. That Act required political committees, defined as organizations that accept contributions or make expenditures "for the purpose of

[70] The Court of Appeals' ruling that § 437a is unconstitutional was not appealed. See n. 7, *supra*.

influencing or attempting to influence" the Presidential or Vice Presidential elections (a) in two or more States or (b) as a subsidiary of a national committee, § 302 (c), 43 Stat. 1070, to report total contributions and expenditures, including the names and addresses of contributors of $100 or more and recipients of $10 or more in a calendar year. § 305 (a), 43 Stat. 1071. The Act was upheld against a challenge that it infringed upon the prerogatives of the States in *Burroughs* v. *United States*, 290 U. S. 534 (1934). The Court held that it was within the power of Congress "to pass appropriate legislation to safeguard [a Presidential] election from the improper use of money to influence the result." *Id.*, at 545. Although the disclosure requirements were widely circumvented,[71] no further attempts were made to tighten them until 1960, when the Senate passed a bill that would have closed some existing loopholes. S. 2436, 106 Cong. Rec. 1193. The attempt aborted because no similar effort was made in the House.

The Act presently under review replaced all prior disclosure laws. Its primary disclosure provisions impose reporting obligations on "political committees" and candidates. "Political committee" is defined in § 431 (d) as a group of persons that receives "contributions" or makes "expenditures" of over $1,000 in a calendar year. "Contributions" and "expenditures" are defined in lengthy parallel provisions similar to those in Title 18, discussed

[71] Past disclosure laws were relatively easy to circumvent because candidates were required to report only contributions that they had received themselves or that were received by others for them with their knowledge or consent. § 307, 43 Stat. 1072. The data that were reported were virtually impossible to use because there were no uniform rules for the compiling of reports or provisions for requiring corrections and additions. See Redish, Campaign Spending Laws and the First Amendment, 46 N. Y. U. L. Rev. 900, 905 (1971).

above.[72] Both definitions focus on the use of money or other objects of value "for the purpose of . . . influencing" the nomination or election of any person to federal office. §§ 431 (e)(1), (f)(1).

Each political committee is required to register with the Commission, § 433, and to keep detailed records of both contributions and expenditures, §§ 432 (c), (d). These records must include the name and address of everyone making a contribution in excess of $10, along with the date and amount of the contribution. If a person's contributions aggregate more than $100, his occupation and principal place of business are also to be included. § 432 (c)(2). These files are subject to periodic audits and field investigations by the Commission. § 438 (a)(8).

Each committee and each candidate also is required to file quarterly reports. § 434 (a). The reports are to contain detailed financial information, including the full name, mailing address, occupation, and principal place of business of each person who has contributed over $100 in a calendar year, as well as the amount and date of the contributions. § 434 (b). They are to be made available by the Commission "for public inspection and copying." § 438 (a)(4). Every candidate for federal office is required to designate a "principal campaign committee," which is to receive reports of contributions and expenditures made on the candidate's behalf from other political committees and to compile and file these reports, together with its own statements, with the Commission. § 432 (f).

Every individual or group, other than a political committee or candidate, who makes "contributions" or "expenditures" of over $100 in a calendar year "other than

[72] See Part I, *supra*. The relevant provisions of Title 2 are set forth in the Appendix to this opinion, *infra*, at 144 *et seq.*

by contribution to a political committee or candidate" is required to file a statement with the Commission. § 434 (e). Any violation of these recordkeeping and reporting provisions is punishable by a fine of not more than $1,000 or a prison term of not more than a year, or both. § 441 (a).

A. General Principles

Unlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities. But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. *E. g., Gibson* v. *Florida Legislative Comm.*, 372 U. S. 539 (1963); *NAACP* v. *Button*, 371 U. S. 415 (1963); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *NAACP* v. *Alabama*, 357 U. S. 449 (1958).

We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP* v. *Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny.[73] We also have insisted that there be a "relevant correlation"[74] or "substantial relation"[75] between the governmental interest and the information required to be disclosed. See *Pollard* v. *Roberts*, 283 F. Supp. 248, 257 (ED Ark.) (three-judge court), aff'd, 393 U. S. 14 (1968)

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[73] *NAACP* v. *Alabama*, 357 U. S., at 463. See also *Gibson* v. *Florida Legislative Comm.*, 372 U. S. 539, 546 (1963); *NAACP* v. *Button*, 371 U. S., at 438; *Bates* v. *Little Rock*, 361 U. S., at 524.

[74] *Id.*, at 525.

[75] *Gibson* v. *Florida Legislative Comm.*, *supra*, at 546.

(*per curiam*). This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure. *NAACP* v. *Alabama, supra,* at 461. Cf. *Kusper* v. *Pontikes,* 414 U. S., at 57–58.

Appellees argue that the disclosure requirements of the Act differ significantly from those at issue in *NAACP* v. *Alabama* and its progeny because the Act only requires disclosure of the names of contributors and does not compel political organizations to submit the names of their members.[76]

As we have seen, group association is protected because it enhances "[e]ffective advocacy." *NAACP* v. *Alabama, supra,* at 460. The right to join together "for the advancement of beliefs and ideas," *ibid.*, is diluted if it does not include the right to pool money through contributions, for funds are often essential if "advocacy" is

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[76] The Court of Appeals held that the applicable test for evaluating the Act's disclosure requirements is that adopted in *United States* v. *O'Brien,* 391 U. S. 367 (1968), in which " 'speech' and 'nonspeech' elements [were] combined in the same course of conduct." *Id.,* at 376. *O'Brien* is appropriate, the Court of Appeals found, because the Act is directed toward the spending of money, and money introduces a nonspeech element. As the discussion in Part I–A, *supra,* indicates, *O'Brien* is inapposite, for money is a neutral element not always associated with speech but a necessary and integral part of many, perhaps most, forms of communication. Moreover, the *O'Brien* test would not be met, even if it were applicable. *O'Brien* requires that "the governmental interest [be] unrelated to the suppression of free expression." *Id.,* at 377. The governmental interest furthered by the disclosure requirements is not unrelated to the "suppression" of speech insofar as the requirements are designed to facilitate the detection of violations of the contribution and expenditure limitations set out in 18 U. S. C. § 608 (1970 ed., Supp. IV).

to be truly or optimally "effective." Moreover, the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for "[f]inancial transactions can reveal much about a person's activities, associations, and beliefs." *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 78–79 (1974) (POWELL, J., concurring). Our past decisions have not drawn fine lines between contributors and members but have treated them interchangeably. In *Bates,* for example, we applied the principles of *NAACP* v. *Alabama* and reversed convictions for failure to comply with a city ordinance that required the disclosure of "dues, assessments, and contributions paid, by whom and when paid." 361 U. S., at 518. See also *United States* v. *Rumely,* 345 U. S. 41 (1953) (setting aside a contempt conviction of an organization official who refused to disclose names of those who made bulk purchases of books sold by the organization).

The strict test established by *NAACP* v. *Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the "free functioning of our national institutions" is involved. *Communist Party* v. *Subversive Activities Control Bd.,* 367 U. S. 1, 97 (1961).

The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" [77] in order to aid the voters in evaluating those

[77] H. R. Rep. No. 92–564, p. 4 (1971).

who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.[78] This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.[79] And, as we recognized in *Burroughs* v. *United States*, 290 U. S., at 548, Congress could reasonably conclude that full disclosure during an election campaign tends "to prevent the corrupt use of money to affect elections." In enacting these requirements it may have been mindful of Mr. Justice Brandeis' advice:

> "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." [80]

Third, and not least significant, recordkeeping, report-

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[78] *Ibid.*; S. Rep. No. 93–689, p. 2 (1974).

[79] We have said elsewhere that "informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936). Cf. *United States* v. *Harriss*, 347 U. S. 612, 625 (1954) (upholding disclosure requirements imposed on lobbyists by the Federal Regulation of Lobbying Act, Title III of the Legislative Reorganization Act of 1946, 60 Stat. 839).

[80] L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933).

ing, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

The disclosure requirements, as a general matter, directly serve substantial governmental interests. In determining whether these interests are sufficient to justify the requirements we must look to the extent of the burden that they place on individual rights.

It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress has sought to promote by this legislation. In this process, we note and agree with appellants' concession [81] that disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.[82] Appellants argue, however, that the balance tips against disclosure when it is required of contributors to certain parties and candidates. We turn now to this contention.

B. Application to Minor Parties and Independents

Appellants contend that the Act's requirements are overbroad insofar as they apply to contributions to minor

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[81] See *supra*, at 60.

[82] Post-election disclosure by successful candidates is suggested as a less restrictive way of preventing corrupt pressures on officeholders. Delayed disclosure of this sort would not serve the equally important informational function played by pre-election reporting. Moreover, the public interest in sources of campaign funds is likely to be at its peak during the campaign period; that is the time when improper influences are most likely to be brought to light.

parties and independent candidates because the governmental interest in this information is minimal and the danger of significant infringement on First Amendment rights is greatly increased.

1. Requisite Factual Showing

In *NAACP* v. *Alabama* the organization had "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," 357 U. S., at 462, and the State was unable to show that the disclosure it sought had a "substantial bearing" on the issues it sought to clarify, *id.*, at 464. Under those circumstances, the Court held that "whatever interest the State may have in [disclosure] has not been shown to be sufficient to overcome petitioner's constitutional objections." *Id.*, at 465.

The Court of Appeals rejected appellants' suggestion that this case fits into the *NAACP* v. *Alabama* mold. It concluded that substantial governmental interests in "informing the electorate and preventing the corruption of the political process" were furthered by requiring disclosure of minor parties and independent candidates, 171 U. S. App. D. C., at 218, 519 F. 2d, at 867, and therefore found no "tenable rationale for assuming that the public interest in minority party disclosure of contributions above a reasonable cutoff point is uniformly outweighed by potential contributors' associational rights," *id.*, at 219, 519 F. 2d, at 868. The court left open the question of the application of the disclosure requirements to candidates (and parties) who could demonstrate injury of the sort at stake in *NAACP* v. *Alabama*. No record of harassment on a similar scale was found in this case.[83] We agree with

[83] Nor is this a case comparable to *Pollard* v. *Roberts*, 283 F.

the Court of Appeals' conclusion that *NAACP* v. *Alabama* is inapposite where, as here, any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative.

It is true that the governmental interest in disclosure is diminished when the contribution in question is made to a minor party with little chance of winning an election. As minor parties usually represent definite and publicized viewpoints, there may be less need to inform the voters of the interests that specific candidates represent. Major parties encompass candidates of greater diversity. In many situations the label "Republican" or "Democrat" tells a voter little. The candidate who bears it may be supported by funds from the far right, the far left, or any place in between on the political spectrum. It is less likely that a candidate of, say, the Socialist Labor Party will represent interests that cannot be discerned from the party's ideological position.

The Government's interest in deterring the "buying" of elections and the undue influence of large contributors on officeholders also may be reduced where contributions to a minor party or an independent candidate are concerned, for it is less likely that the candidate will be victorious. But a minor party sometimes can play a significant role in an election. Even when a minor-party candidate has little or no chance of winning, he may be encouraged by major-party interests in order to divert votes from other major-party contenders.[84]

Supp. 248 (ED Ark.) (three-judge court), aff'd, 393 U. S. 14 (1968), in which an Arkansas prosecuting attorney sought to obtain, by a subpoena *duces tecum*, the records of a checking account (including names of individual contributors) established by a specific party, the Republican Party of Arkansas.

[84] See Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1247 n. 75 (1975).

We are not unmindful that the damage done by disclosure to the associational interests of the minor parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within [85] and without [86] the political arena.

There could well be a case, similar to those before the Court in *NAACP* v. *Alabama* and *Bates*, where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied.[87] But no appellant in this case has tendered record evidence of the sort proffered in *NAACP* v. *Alabama*. Instead, appellants primarily rely on "the clearly articulated fears of individuals, well experienced in the political process." Brief for Appellants 173. At

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[85] See *Williams* v. *Rhodes*, 393 U. S. 23, 32 (1968) ("There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms"); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250–251 (1957) (plurality opinion).

[86] Cf. *Talley* v. *California*, 362 U. S. 60, 64–65 (1960).

[87] Allegations made by a branch of the Socialist Workers Party in a civil action seeking to declare the District of Columbia disclosure and filing requirements unconstitutional as applied to its records were held to be sufficient to withstand a motion to dismiss in *Doe* v. *Martin*, 404 F. Supp. 753 (1975) (three-judge court). The District of Columbia provisions require every political committee to keep records of contributions of $10 or more and to report contributors of $50 or more.

best they offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure.[88] On this record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged.

2. Blanket Exemption

Appellants agree that "the record here does not reflect the kind of focused and insistent harassment of contributors and members that existed in the NAACP cases." *Ibid.* They argue, however, that a blanket exemption for minor parties is necessary lest irreparable injury be done before the required evidence can be gathered.

Those parties that would be sufficiently "minor" to be exempted from the requirements of § 434 could be defined, appellants suggest, along the lines used for public-financing purposes, see Part III–A, *infra*, as those who received less than 25% of the vote in past elections. Appellants do not argue that this line is constitutionally required. They suggest as an alternative defining "minor parties" as those that do not qualify for automatic ballot access under state law. Presumably, other criteria, such as current political strength (measured by polls or petition), age, or degree of organization, could also be used.[89]

The difficulty with these suggestions is that they reflect only a party's past or present political strength and

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[88] For example, a campaign worker who had solicited campaign funds for the Libertarian Party in New York testified that two persons solicited in a Party campaign "refused to contribute because they were unwilling for their names to be disclosed or published." None of the appellants offers stronger evidence of threats or harassment.

[89] These criteria were suggested in an opinion concurring in part and dissenting in part from the decision below. 171 U. S. App. D. C., at 258 n. 1, 519 F. 2d, at 907 n. 1 (Bazelon, C. J.).

that is only one of the factors that must be considered. Some of the criteria are not precisely indicative of even that factor. Age,[90] or past political success, for instance, may typically be associated with parties that have a high probability of success. But not all long-established parties are winners—some are consistent losers—and a new party may garner a great deal of support if it can associate itself with an issue that has captured the public's imagination. None of the criteria suggested is precisely related to the other critical factor that must be considered, the possibility that disclosure will impinge upon protected associational activity.

An opinion dissenting in part from the Court of Appeals' decision concedes that no one line is "constitutionally required." [91] It argues, however, that a flat exemption for minor parties must be carved out, even along arbitrary lines, if groups that would suffer impermissibly from disclosure are to be given any real protection. An approach that requires minor parties to submit evidence that the disclosure requirements cannot constitutionally be applied to them offers only an illusory safeguard, the argument goes, because the "evils" of "chill and harassment . . . are largely incapable of formal proof." [92] This dissent expressed its concern that a minor party, particularly a

[90] Age is also underinclusive in that it would presumably leave long-established but unpopular parties subject to the disclosure requirements. The Socialist Labor Party, which is not a party to this litigation but which has filed an *amicus* brief in support of appellants, claims to be able to offer evidence of "direct suppression, intimidation, harassment, physical abuse, and loss of economic sustenance" relating to its contributors. Brief for Socialist Labor Party as *Amicus Curiae* 6. The Party has been in existence since 1877.

[91] 171 U. S. App. D. C., at 258, 519 F. 2d, at 907 n. 1 (Bazelon C. J.).

[92] *Id.*, at 260, 519 F. 2d, at 909. See also Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1247–1249 (1975).

new party, may never be able to prove a substantial threat of harassment, however real that threat may be, because it would be required to come forward with witnesses who are too fearful to contribute but not too fearful to testify about their fear. A strict requirement that chill and harassment be directly attributable to the specific disclosure from which the exemption is sought would make the task even more difficult.

We recognize that unduly strict requirements of proof could impose a heavy burden, but it does not follow that a blanket exemption for minor parties is necessary. Minor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim. The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.

Where it exists the type of chill and harassment identified in *NAACP* v. *Alabama* can be shown. We cannot assume that courts will be insensitive to similar showings when made in future cases. We therefore conclude that a blanket exemption is not required.

C. Section 434 (e)

Section 434 (e) requires "[e]very person (other than a political committee or candidate) who makes contribu-

tions or expenditures" aggregating over $100 in a calendar year "other than by contribution to a political committee or candidate" to file a statement with the Commission.[93] Unlike the other disclosure provisions, this section does not seek the contribution list of any association. Instead, it requires direct disclosure of what an individual or group contributes or spends.

In considering this provision we must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP* v. *Alabama* derives from the rights of the organization's members to advocate their personal points of view in the most effective way. 357 U. S., at 458, 460. See also *NAACP* v. *Button*, 371 U. S., at 429–431; *Sweezy* v. *New Hampshire*, 354 U. S., at 250.

Appellants attack § 434 (e) as a direct intrusion on privacy of belief, in violation of *Talley* v. *California*, 362 U. S. 60 (1960), and as imposing "very real, practical burdens . . . certain to deter individuals from making expenditures for their independent political speech" analogous to those held to be impermissible in *Thomas* v. *Collins*, 323 U. S. 516 (1945).

1. The Role of § 434 (e)

The Court of Appeals upheld § 434 (e) as necessary to enforce the independent-expenditure ceiling imposed by 18 U. S. C. § 608 (e)(1) (1970 ed., Supp. IV). It said:

> "If . . . Congress has both the authority and a compelling interest to regulate independent expenditures under section 608 (e), surely it can require that there be disclosure to prevent misuse of the spending channel." 171 U. S. App. D. C., at 220 519 F. 2d, at 869.

We have found that § 608 (e)(1) unconstitutionally in-

[93] See Appendix to this opinion, *infra*, at 160.

fringes upon First Amendment rights.[94] If the sole function of § 434 (e) were to aid in the enforcement of that provision, it would no longer serve any governmental purpose.

But the two provisions are not so intimately tied. The legislative history on the function of § 434 (e) is bare, but it was clearly intended to stand independently of § 608 (e)(1). It was enacted with the general disclosure provisions in 1971 as part of the original Act,[95] while § 608(e)(1) was part of the 1974 amendments.[96] Like the other disclosure provisions, § 434 (e) could play a role in the enforcement of the expanded contribution and expenditure limitations included in the 1974 amendments, but it also has independent functions. Section 434 (e) is part of Congress' effort to achieve "total disclosure" by reaching "every kind of political activity" [97] in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible. The provision is responsive to the legitimate fear that efforts would be made, as they had been in the past,[98] to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act.

2. Vagueness Problems

In its effort to be all-inclusive, however, the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties [99] and fear of incurring these sanctions

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[94] See Part I–C–1, *supra*.

[95] § 305, 86 Stat. 16.

[96] 88 Stat. 1265.

[97] S. Rep. No. 92–229, p. 57 (1971).

[98] See n. 71, *supra*.

[99] Section 441 (a) provides: "Any person who violates any of

may deter those who seek to exercise protected First Amendment rights.

Section 434 (e) applies to "[e]very person . . . who makes contributions or expenditures." "Contributions" and "expenditures" are defined in parallel provisions in terms of the use of money or other valuable assets "for the purpose of . . . influencing" the nomination or election of candidates for federal office.[100] It is the ambiguity of this phrase that poses constitutional problems.

Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954). See also *Papachristou* v. *City of Jacksonville*, 405 U. S. 156 (1972). Where First Amendment rights are involved, an even "greater degree of specificity" is required. *Smith* v. *Goguen*, 415 U. S., at 573. See *Grayned* v. *City of Rockford*, 408 U. S. 104, 109 (1972); *Kunz* v. *New York*, 340 U. S. 290 (1951).

There is no legislative history to guide us in determining the scope of the critical phrase "for the purpose of . . . influencing." It appears to have been adopted without comment from earlier disclosure Acts.[101] Congress "has voiced its wishes in [most] muted strains," leaving us to draw upon "those common-sense assumptions that must be made in determining direction without a compass." *Rosado* v. *Wyman*, 397 U. S. 397, 412 (1970). Where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute,

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the provisions of this subchapter shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[100] §§ 431 (e), (f). See Appendix to this opinion, *infra*, at 145–149.

[101] See *supra*, at 61–63.

if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness. *United States* v. *Harriss, supra,* at 618; *United States* v. *Rumely,* 345 U. S., at 45.

In enacting the legislation under review Congress addressed broadly the problem of political campaign financing. It wished to promote full disclosure of campaign-oriented spending to insure both the reality and the appearance of the purity and openness of the federal election process.[102] Our task is to construe "for the purpose of . . . influencing," incorporated in § 434 (e) through the definitions of "contributions" and "expenditures," in a manner that precisely furthers this goal.

In Part I we discussed what constituted a "contribution" for purposes of the contribution limitations set forth in 18 U. S. C. § 608 (b) (1970 ed., Supp. IV).[103] We construed that term to include not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate. The definition of "contribution" in § 431 (e) for disclosure purposes parallels the definition in Title 18 almost word for word, and we construe the former provision as we have the latter. So defined, "contributions" have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.

When we attempt to define "expenditure" in a similarly narrow way we encounter line-drawing problems

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[102] S. Rep. No. 92–96, p. 33 (1971); S. Rep. No. 93–689, pp. 1–2 (1974).

[103] See n. 53, *supra.*

of the sort we faced in 18 U. S. C. § 608 (e)(1) (1970 ed., Supp. IV). Although the phrase, "for the purpose of . . . influencing" an election or nomination, differs from the language used in § 608 (e)(1), it shares the same potential for encompassing both issue discussion and advocacy of a political result.[104] The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," [105] and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly.[106] To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

But when the maker of the expenditure is not within these categories—when it is an individual other than a candidate or a group other than a "political commit-

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[104] See Part I–C–1, *supra*.

[105] Section 431 (d) defines "political committee" as "any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000."

[106] At least two lower courts, seeking to avoid questions of unconstitutionality, have construed the disclosure requirements imposed on "political committees" by § 434 (a) to be nonapplicable to nonpartisan organizations. *United States* v. *National Comm. for Impeachment*, 469 F. 2d, at 1139–1142; *American Civil Liberties Union* v. *Jennings*, 366 F. Supp., at 1055–1057. See also 171 U. S. App. D. C., at 214 n. 112, 519 F. 2d, at 863 n. 112.

tee" [107]—the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of § 434 (e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of § 608 (e)—to reach only funds used for communications that expressly advocate [108] the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.

In summary, § 434 (e), as construed, imposes independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.

Unlike 18 U. S. C. § 608 (e)(1) (1970 ed., Supp. IV), § 434 (e), as construed, bears a sufficient relationship to a substantial governmental interest. As narrowed, § 434 (e), like § 608 (e)(1), does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result. This might have been fatal if the only purpose of § 434 (e)

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[107] Some partisan committees—groups within the control of the candidate or primarily organized for political activities—will fall within § 434 (e) because their contributions and expenditures fall in the $100-to-$1,000 range. Groups of this sort that do not have contributions and expenditures over $1,000 are not "political committees" within the definition in § 431 (d); those whose transactions are not as great as $100 are not required to file statements under § 434 (e).

[108] See n. 52, *supra*.

were to stem corruption or its appearance by closing a loophole in the general disclosure requirements. But the disclosure provisions, including § 434 (e), serve another, informational interest, and even as construed § 434 (e) increases the fund of information concerning those who support the candidates. It goes beyond the general disclosure requirements to shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors. By the same token, it is not fatal that § 434 (e) encompasses purely independent expenditures uncoordinated with a particular candidate or his agent. The corruption potential of these expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies.

Section 434 (e), as we have construed it, does not contain the infirmities of the provisions before the Court in *Talley* v. *California*, 362 U. S. 60 (1960), and *Thomas* v. *Collins*, 323 U. S. 516 (1945). The ordinance found wanting in *Talley* forbade all distribution of handbills that did not contain the name of the printer, author, or manufacturer, and the name of the distributor. The city urged that the ordinance was aimed at identifying those responsible for fraud, false advertising, and libel, but the Court found that it was "in no manner so limited." 362 U. S., at 64. Here, as we have seen, the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced. *Thomas* held unconstitutional a prior restraint in the form of a registration requirement for labor organizers.

The Court found the State's interest insufficient to justify the restrictive effect of the statute. The burden imposed by § 434 (e) is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.[109]

D. Thresholds

Appellants' third contention, based on alleged overbreadth, is that the monetary thresholds in the record-keeping and reporting provisions lack a substantial nexus with the claimed governmental interests, for the amounts involved are too low even to attract the attention of the candidate, much less have a corrupting influence.

The provisions contain two thresholds. Records are to be kept by political committees of the names and addresses of those who make contributions in excess of $10, § 432 (c)(2), and these records are subject to Commission audit, § 438 (a)(8). If a person's contributions to a committee or candidate aggregate more than $100, his name and address, as well as his occupation and principal place of business, are to be included in reports filed by committees and candidates with the Commission, § 434 (b)(2), and made available for public inspection, § 438 (a)(4).

The Court of Appeals rejected appellants' contention that these thresholds are unconstitutional. It found the challenge on First Amendment grounds to the $10 threshold to be premature, for it could "discern no basis in the statute for authorizing disclosure outside the Com-

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[109] Of course, independent contributions and expenditures made in support of the campaigns of candidates of parties that have been found to be exempt from the general disclosure requirements because of the possibility of consequent chill and harassment would be exempt from the requirements of § 434 (e).

mission . . . , and hence no substantial 'inhibitory effect' operating upon" appellants. 171 U. S. App. D. C., at 216, 519 F. 2d, at 865. The $100 threshold was found to be within the "reasonable latitude" given the legislature "as to where to draw the line." *Ibid.* We agree.

The $10 and $100 thresholds are indeed low. Contributors of relatively small amounts are likely to be especially sensitive to recording or disclosure of their political preferences. These strict requirements may well discourage participation by some citizens in the political process, a result that Congress hardly could have intended. Indeed, there is little in the legislative history to indicate that Congress focused carefully on the appropriate level at which to require recording and disclosure. Rather, it seems merely to have adopted the thresholds existing in similar disclosure laws since 1910.[110] But we cannot require Congress to establish that it has chosen the highest reasonable threshold. The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion. We cannot say, on this bare record, that the limits designated are wholly without rationality.[111]

We are mindful that disclosure serves informational functions, as well as the prevention of corruption and the enforcement of the contribution limitations. Congress is not required to set a threshold that is tailored only to the latter goals. In addition, the enforcement

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[110] See *supra*, at 61–63.

[111] "Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 41 (1928) (Holmes, J., dissenting).

goal can never be well served if the threshold is so high that disclosure becomes equivalent to admitting violation of the contribution limitations.

The $10 recordkeeping threshold, in a somewhat similar fashion, facilitates the enforcement of the disclosure provisions by making it relatively difficult to aggregate secret contributions in amounts that surpass the $100 limit. We agree with the Court of Appeals that there is no warrant for assuming that public disclosure of contributions between $10 and $100 is authorized by the Act. Accordingly, we do not reach the question whether information concerning gifts of this size can be made available to the public without trespassing impermissibly on First Amendment rights. Cf. *California Bankers Assn.* v. *Shultz*, 416 U. S., at 56–57.[112]

In summary, we find no constitutional infirmities in the recordkeeping, reporting, and disclosure provisions of the Act.[113]

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[112] Appellants' final argument is directed against § 434 (d), which exempts from the reporting requirements certain "photographic, matting, or recording services" furnished to Congressmen in nonelection years. See Appendix to this opinion, *infra*, at 159. Although we are troubled by the considerable advantages that this exemption appears to give to incumbents, we agree with the Court of Appeals that, in the absence of record evidence of misuse or undue discriminatory impact, this provision represents a reasonable accommodation between the legitimate and necessary efforts of legislators to communicate with their constituents and activities designed to win elections by legislators in their other role as politicians.

[113] Accordingly, we respond to the certified questions, as follows:

7. Do the particular requirements in the challenged statutes that persons disclose the amounts that they contribute or expend in connection with elections for federal office or that candidates for such office disclose the amounts that they expend in their campaigns violate the rights of one or more of the plaintiffs under the First,

III. PUBLIC FINANCING OF PRESIDENTIAL ELECTION CAMPAIGNS

A series of statutes [114] for the public financing of Presidential election campaigns produced the scheme now found in § 6096 and Subtitle H of the Internal Revenue

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Fourth, or Ninth Amendment or the Due Process Clause of the Fifth Amendment?

(a) Do 2 U. S. C. §§ 432 (b), (c), and (d) and 438 (a)(8) (1970 ed., Supp. IV) violate such rights, in that they provide, through auditing procedures, for the Federal Election Commission to inspect lists and records required to be kept by political committees of individuals who contribute more than $10?

Answer: NO.

(b) Does 2 U. S. C. §§ 434 (b)(1)–(8) (1970 ed., Supp. IV) violate such rights, in that it requires political committees to register and disclose the names, occupations, and principal places of business (if any) of those of their contributors who contribute in excess of $100?

Answer: NO.

(c) Does 2 U. S. C. § 434 (d) (1970 ed., Supp. IV) violate such rights, in that it neither requires disclosure of nor treats as contribution to or expenditure by incumbent officeholders the resources enumerated in 2 U. S. C. § 434 (d) (1970 ed., Supp. IV)?

Answer: NO.

(d) Does 2 U. S. C. § 434 (e) (1970 ed., Supp. IV) violate such rights, in that it provides that every person contributing or expending more than $100 other than by contribution to a political committee or candidate (including volunteers with incidental expenses in excess of $600) must make disclosure to the Federal Election Commission?

Answer: NO.

[114] The Presidential Election Campaign Fund Act of 1966, Title IV of Pub. L. 89–909, §§ 301–305, 80 Stat. 1587, was the first such provision. This Act also initiated the dollar check-off provision now contained in 26 U. S. C. § 6096 (1970 ed., Supp. IV). The Act was suspended, however, by a 1967 provision barring any appropriations until Congress adopted guidelines for the distribution of money from the Fund. Pub. L. 90–26, § 5, 81 Stat. 58. In 1971 Congress added Subtitle H to the Internal Revenue Code. Pub. L. 92–178, § 801,

Code of 1954, 26 U. S. C. §§ 6096, 9001–9012, 9031–9042 (1970 ed., Supp. IV).[115] Both the District Court, 401 F. Supp. 1235, and the Court of Appeals, 171 U. S. App. D. C., at 229–238, 519 F. 2d, at 878–887, sustained Subtitle H against a constitutional attack.[116] Appellants renew their challenge here, contending that the legislation violates the First and Fifth Amendments. We find no merit in their claims and affirm.

A. Summary of Subtitle H

Section 9006 establishes a Presidential Election Campaign Fund (Fund), financed from general revenues in the aggregate amount designated by individual taxpayers, under § 6096, who on their income tax returns may authorize payment to the Fund of one dollar of their tax liability in the case of an individual return or two dollars in the case of a joint return. The Fund consists of three separate accounts to finance (1) party nominating conventions, § 9008 (a), (2) general election campaigns, § 9006 (a), and (3) primary campaigns, § 9037 (a).[117]

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85 Stat. 562. Chapter 95 thereof provided public financing of general election campaigns for President; this legislation was to become effective for the 1976 election and is substantially the same as the present scheme. Congress later amended the dollar check-off provision, deleting the taxpayers' option to designate specific parties as recipients of their money. Pub. L. 93–53, § 6, 87 Stat. 138. Finally, the 1974 amendments added to Chapter 95 provisions for financing nominating conventions and enacted a new Chapter 96 providing matching funds for campaigns in Presidential primaries. Pub. L. 93–443, §§ 403–408, 88 Stat. 1291.

[115] Unless otherwise indicated all statutory citations in this Part III are to the Internal Revenue Code of 1954, Title 26 of the United States Code, 1970 edition, Supplement IV.

[116] See n. 6, *supra*.

[117] Priorities are established when the Fund is insufficient to satisfy all entitlements in any election year: the amount in the Fund is first allocated to convention funding, then to financing the general elec-

Chapter 95 of Title 26, which concerns financing of party nominating conventions and general election campaigns, distinguishes among "major," "minor," and "new" parties. A major party is defined as a party whose candidate for President in the most recent election received 25% or more of the popular vote. § 9002 (6). A minor party is defined as a party whose candidate received at least 5% but less than 25% of the vote at the most recent election. § 9002 (7). All other parties are new parties, § 9002 (8), including both newly created parties and those receiving less than 5% of the vote in the last election.[118]

Major parties are entitled to $2,000,000 to defray their national committee Presidential nominating convention expenses, must limit total expenditures to that amount, § 9008 (d),[119] and may not use any of this money to benefit a particular candidate or delegate, § 9008 (c).

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tion, and finally to primary matching assistance. See §§ 9008 (a), 9037 (a). But the law does not specify how funds are to be allocated among recipients within these categories. Cf. § 9006 (d).

[118] Independent candidates might be excluded from general election funding by Chapter 95. See §§ 9002 (2)(B), 9003 (a), (c), 9004 (a)(2), (c), 9005 (a), 9006 (c). Serious questions might arise as to the constitutionality of excluding from free annual assistance candidates not affiliated with a "political party" solely because they lack such affiliation. *Storer* v. *Brown*, 415 U. S. 724, 745–746 (1974). But we have no occasion to address that question in this case. The possibility of construing Chapter 95 as affording financial assistance to independent candidates was remarked by the Court of Appeals. 171 U. S. App. D. C., at 238, 519 F. 2d, at 887. The only announced independent candidate for President before the Court—former Senator McCarthy—has publicly announced that he will refuse any public assistance. Moreover, he is affiliated with the Committee for a Constitutional Presidency—McCarthy '76, and there is open the question whether it would qualify as a "political party" under Subtitle H.

[119] No party to this case has challenged the constitutionality of this expenditure limit.

A minor party receives a portion of the major-party entitlement determined by the ratio of the votes received by the party's candidate in the last election to the average of the votes received by the major parties' candidates. § 9008 (b)(2). The amounts given to the parties and the expenditure limit are adjusted for inflation, using 1974 as the base year. § 9008 (b)(5). No financing is provided for new parties, nor is there any express provision for financing independent candidates or parties not holding a convention.

For expenses in the general election campaign, § 9004 (a)(1) entitles each major-party candidate to $20,000,000.[120] This amount is also adjusted for inflation. See § 9004 (a)(1). To be eligible for funds the candidate[121] must pledge not to incur expenses in excess of the entitlement under § 9004 (a)(1) and not to accept private contributions except to the extent that the fund is insufficient to provide the full entitlement. § 9003 (b). Minor-party candidates are also entitled to funding, again based on the ratio of the vote received by the party's candidate in the preceding election to the average of the major-party candidates. § 9004 (a)(2)(A). Minor-party candidates must certify that they will not incur campaign expenses in excess of the major-party entitlement and

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[120] This amount is the same as the expenditure limit provided in 18 U. S. C. § 608 (c)(1)(B) (1970 ed., Supp. IV). The Court of Appeals viewed the provisions as "complementary stratagems." 171 U. S. App. D. C., at 201, 519 F. 2d, at 850. Since the Court today holds § 608 (c)(1) to be unconstitutional, the question of the severability of general election funding as now constituted arises. We hold that the provisions are severable for the reasons stated in Part III–C, *infra*.

[121] No separate pledge is required from the candidate's party, but if the party organization is an "authorized committee" or "agent," expenditures by the party may be attributed to the candidate. 18 U. S. C. § 608 (c)(2)(B) (1970 ed., Supp. IV). See § 608 (b)(4)(A).

that they will accept private contributions only to the extent needed to make up the difference between that amount and the public funding grant. § 9003 (c). New-party candidates receive no money prior to the general election, but any candidate receiving 5% or more of the popular vote in the election is entitled to post-election payments according to the formula applicable to minor-party candidates. § 9004 (a)(3). Similarly, minor-party candidates are entitled to post-election funds if they receive a greater percentage of the average major-party vote than their party's candidate did in the preceding election; the amount of such payments is the difference between the entitlement based on the preceding election and that based on the actual vote in the current election. § 9004 (a)(3). A further eligibility requirement for minor- and new-party candidates is that the candidate's name must appear on the ballot, or electors pledged to the candidate must be on the ballot, in at least 10 States. § 9002 (2) (B).

Chapter 96 establishes a third account in the Fund, the Presidential Primary Matching Payment Account. § 9037 (a). This funding is intended to aid campaigns by candidates seeking Presidential nomination "by a political party," § 9033 (b)(2), in "primary elections," § 9032 (7).[122] The threshold eligibility requirement is that the candidate raise at least $5,000 in each of 20 States, counting only the first $250 from each person contributing to the candidate. §§ 9033 (b)(3), (4). In addition, the candidate must agree to abide by the spending limits in § 9035. See § 9033 (b)(1).[123] Funding is

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[122] As with Chapter 95, any constitutional question that may arise from the exclusion of independent candidates from any assistance, such as funds to defray expenses of getting on state ballots by petition drives, need not be addressed in this case. See n. 118, *supra*.

[123] As with general election funding, this limit is the same as

provided according to a matching formula: each qualified candidate is entitled to a sum equal to the total private contributions received, disregarding contributions from any person to the extent that total contributions to the candidate by that person exceed $250. § 9034 (a). Payments to any candidate under Chapter 96 may not exceed 50% of the overall expenditure ceiling accepted by the candidate. § 9034 (b).

B. Constitutionality of Subtitle H

Appellants argue that Subtitle H is invalid (1) as "contrary to the 'general welfare,'" Art. I, § 8, (2) because any scheme of public financing of election campaigns is inconsistent with the First Amendment, and (3) because Subtitle H invidiously discriminates against certain interests in violation of the Due Process Clause of the Fifth Amendment. We find no merit in these contentions.

Appellants' "general welfare" contention erroneously treats the General Welfare Clause as a limitation upon congressional power. It is rather a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 420 (1819). Congress has power to regulate Presidential elections and primaries, *United States* v. *Classic*, 313 U. S. 299 (1941); *Burroughs* v. *United States*, 290 U. S. 534 (1934); and public financing of Presidential elections as a means to reform the electoral process was clearly a choice within the granted power. It is for Congress to decide which expenditures will promote the general welfare: "[T]he power of Congress to authorize expenditure of public moneys for public purposes is not

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the candidate expenditure limit of 18 U. S. C. § 608 (c)(1) (1970 ed., Supp. IV). See n. 120, *supra*, and Part III–C, *infra*.

limited by the direct grants of legislative power found in the Constitution." *United States* v. *Butler,* 297 U. S. 1, 66 (1936). See *Helvering* v. *Davis,* 301 U. S. 619, 640–641 (1937). Any limitations upon the exercise of that granted power must be found elsewhere in the Constitution. In this case, Congress was legislating for the "general welfare"—to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising. See S. Rep. No. 93–689, pp. 1–10 (1974). Whether the chosen means appear "bad," "unwise," or "unworkable" to us is irrelevant; Congress has concluded that the means are "necessary and proper" to promote the general welfare, and we thus decline to find this legislation without the grant of power in Art. I, § 8.

Appellants' challenge to the dollar check-off provision (§ 6096) fails for the same reason. They maintain that Congress is required to permit taxpayers to designate particular candidates or parties as recipients of their money. But the appropriation to the Fund in § 9006 is like any other appropriation from the general revenue except that its amount is determined by reference to the aggregate of the one- and two-dollar authorization on taxpayers' income tax returns. This detail does not constitute the appropriation any less an appropriation by Congress.[124] The fallacy of appellants' argument is therefore appar-

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[124] The scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree, *Lathrop* v. *Donohue,* 367 U. S. 820, 871 (1961) (Black, J., dissenting); *id.,* at 882 (Douglas, J., dissenting); *Machinists* v. *Street,* 367 U. S. 740, 778 (1961) (Douglas, J., concurring); *id.,* at 788–792 (Black, J., dissenting). The § 6096 check-off is simply the means by which Congress determines the amount of its appropriation.

ent; every appropriation made by Congress uses public money in a manner to which some taxpayers object.[125]

Appellants next argue that "by analogy" to the Religion Clauses of the First Amendment public financing of election campaigns, however meritorious, violates the First Amendment. We have, of course, held that the Religion Clauses—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—require Congress, and the States through the Fourteenth Amendment, to remain neutral in matters of religion. *E. g., Abington School Dist.* v. *Schempp,* 374 U. S. 203, 222–226 (1963). The government may not aid one religion to the detriment of others or impose a burden on one religion that is not imposed on others, and may not even aid all religions. *E. g., Everson* v. *Board of Education,* 330 U. S. 1, 15–16 (1947). See Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 96 (1961). But the analogy is patently inapplicable to our issue here. Although "Congress shall make no law . . . abridging the freedom of speech, or of the press," Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge pub-

[125] Some proposals for public financing would give taxpayers the opportunity to designate the candidate or party to receive the dollar, and § 6096 initially offered this choice. See n. 114, *supra.* The voucher system proposed by Senator Metcalf, as *amicus curiae* here, also allows taxpayers this option. But Congress need not provide a mechanism for allowing taxpayers to designate the means in which their particular tax dollars are spent. See n. 124, *supra.* Further, insofar as these proposals are offered as less restrictive means, Congress had legitimate reasons for rejecting both. The designation option was criticized on privacy grounds, 119 Cong. Rec. 22598, 22396 (1973), and also because the identity of all candidates would not be known by April 15, the filing day for annual individual and joint tax returns. Senator Metcalf's proposal has also been criticized as possibly leading to black markets and to coercion to obtain vouchers and as administratively impractical.

lic discussion and participation in the electoral process, goals vital to a self-governing people.[126] Thus, Subtitle H furthers, not abridges, pertinent First Amendment values.[127] Appellants argue, however, that as constructed public financing invidiously discriminates in violation of the Fifth Amendment. We turn therefore to that argument.

Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 638 n. 2 (1975), and cases cited. In several situations concerning the electoral process, the principle has been

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[126] Appellants voice concern that public funding will lead to governmental control of the internal affairs of political parties, and thus to a significant loss of political freedom. The concern is necessarily wholly speculative and hardly a basis for invalidation of the public financing scheme on its face. Congress has expressed its determination to avoid the possibility. S. Rep. No. 93-689, pp. 9-10 (1974).

[127] The historical bases of the Religion and Speech Clauses are markedly different. Intolerable persecutions throughout history led to the Framers' firm determination that religious worship—both in method and belief—must be strictly protected from government intervention. "Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Engel* v. *Vitale,* 370 U. S. 421, 432 (1962) (footnote omitted). See *Everson* v. *Board of Education,* 330 U. S. 1, 8–15 (1947). But the central purpose of the Speech and Press Clauses was to assure a society in which "uninhibited, robust, and wide-open" public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, 47 U. S. C. §§ 390–399, and preferential postal rates and antitrust exemptions for newspapers, 39 CFR § 132.2 (1975); 15 U. S. C. §§ 1801–1804.

developed that restrictions on access to the electoral process must survive exacting scrutiny. The restriction can be sustained only if it furthers a "vital" governmental interest, *American Party of Texas* v. *White*, 415 U. S. 767, 780–781 (1974), that is "achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity." *Lubin* v. *Panish*, 415 U. S. 709, 716 (1974). See *American Party of Texas* v. *White*, *supra*, at 780; *Storer* v. *Brown*, 415 U. S. 724, 729–730 (1974). These cases, however, dealt primarily with state laws requiring a candidate to satisfy certain requirements in order to have his name appear on the ballot. These were, of course, direct burdens not only on the candidate's ability to run for office but also on the voter's ability to voice preferences regarding representative government and contemporary issues. In contrast, the denial of public financing to some Presidential candidates is not restrictive of voters' rights and less restrictive of candidates'.[128] Subtitle H does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to

[128] Appellants maintain that denial of funding is a more severe restriction than denial of access to the ballot, because write-in candidates can win elections, but candidates without funds cannot. New parties will be unfinanced, however, only if they are unable to get private financial support, which presumably reflects a general lack of public support for the party. Public financing of some candidates does not make private fundraising for others any more difficult; indeed, the elimination of private contributions to major-party Presidential candidates might make more private money available to minority candidates.

raise private contributions. Any disadvantage suffered by operation of the eligibility formulae under Subtitle H is thus limited to the claimed denial of the enhancement of opportunity to communicate with the electorate that the formulae afford eligible candidates. But eligible candidates suffer a countervailing denial. As we more fully develop later, acceptance of public financing entails voluntary acceptance of an expenditure ceiling. Non-eligible candidates are not subject to that limitation.[129] Accordingly, we conclude that public financing is generally less restrictive of access to the electoral process than the ballot-access regulations dealt with in prior cases.[130] In any event, Congress enacted Subtitle H in furtherance of sufficiently important governmental interests and has

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[129] Appellants dispute the relevance of this answer to their argument on the ground that they will not be able to raise money to equal major-party spending. As a practical matter, however, Subtitle H does not enhance the major parties' ability to campaign; it substitutes public funding for what the parties would raise privately and additionally imposes an expenditure limit. If a party cannot raise funds privately, there are legitimate reasons not to provide public funding, which would effectively facilitate hopeless candidacies.

[130] Our only prior decision dealing with a system of public financing, *American Party of Texas* v. *White*, 415 U. S. 767 (1974), also recognized that such provisions are less restrictive than regulation of ballot access. Texas required major parties—there called "political parties"—to nominate candidates by primaries, and the State reimbursed the parties for some of the expenses incurred in holding the primaries. But Texas did not subsidize other parties for the expenses involved in qualifying for the ballot, and this denial was claimed to be a denial of equal protection of the laws. We said that we were "unconvinced . . . that this financing law is an 'exclusionary mechanism' which 'tends to deny some voters the opportunity to vote for a candidate of their choosing' or that it has 'a real and appreciable impact on the exercise of the franchise.'" *Id.*, at 794, quoting from *Bullock* v. *Carter*, 405 U. S., at 144. That the aid in *American Party* was provided to parties and not to candidates, as is most of the Subtitle H funding, is immaterial.

not unfairly or unnecessarily burdened the political opportunity of any party or candidate.

It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest. S. Rep. No. 93–689, pp. 4–5 (1974). In addition, the limits on contributions necessarily increase the burden of fundraising, and Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions. See *id.*, at 5. The States have also been held to have important interests in limiting places on the ballot to those candidates who demonstrate substantial popular support. *E. g., Storer* v. *Brown, supra,* at 736; *Lubin* v. *Panish, supra,* at 718–719; *Jenness* v. *Fortson,* 403 U. S. 431, 442 (1971); *Williams* v. *Rhodes,* 393 U. S., at 31–33. Congress' interest in not funding hopeless candidacies with large sums of public money, S. Rep. No. 93–689, *supra,* at 7, necessarily justifies the withholding of public assistance from candidates without significant public support. Thus, Congress may legitimately require "some preliminary showing of a significant modicum of support," *Jenness* v. *Fortson, supra,* at 442, as an eligibility requirement for public funds. This requirement also serves the important public interest against providing artificial incentives to "splintered parties and unrestrained factionalism." *Storer* v. *Brown, supra,* at 736; S. Rep. No. 93–689, *supra,* at 8; H. R. Rep. No. 93–1239, p. 13 (1974). Cf. *Bullock* v. *Carter,* 405 U. S. 134, 145 (1972).

At the same time Congress recognized the constitutional restraints against inhibition of the present opportunity of minor parties to become major political entities if they obtain widespread support. S. Rep. No. 93–689, *supra,* at 8–10; H. R. Rep. No. 93–1239, *supra,* at 13. As

the Court of Appeals said, "provisions for public funding of Presidential campaigns . . . could operate to give an unfair advantage to established parties, thus reducing, to the nation's detriment, . . . the 'potential fluidity of American political life.'" 171 U. S. App. D. C., at 231, 519 F. 2d, at 880, quoting from *Jenness* v. *Fortson, supra,* at 439.

1. General Election Campaign Financing

Appellants insist that Chapter 95 falls short of the constitutional requirement in that its provisions supply larger, and equal, sums to candidates of major parties, use prior vote levels as the sole criterion for pre-election funding, limit new-party candidates to post-election funds, and deny any funds to candidates of parties receiving less than 5% of the vote. These provisions, it is argued, are fatal to the validity of the scheme, because they work invidious discrimination against minor and new parties in violation of the Fifth Amendment. We disagree.[131]

As conceded by appellants, the Constitution does not require Congress to treat all declared candidates the same for public financing purposes. As we said in *Jenness* v. *Fortson,* "there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. . . . Sometimes the grossest discrimination can lie in treating

[131] The allegations of invidious discrimination are based on the claim that Subtitle H is facially invalid; since the public financing provisions have never been in operation, appellants are unable to offer factual proof that the scheme is discriminatory in its effect. In rejecting appellants' arguments, we of course do not rule out the possibility of concluding in some future case, upon an appropriate factual demonstration, that the public financing system invidiously discriminates against nonmajor parties.

things that are different as though they were exactly alike, a truism well illustrated in *Williams* v. *Rhodes, supra.*" 403 U. S., at 441–442. Since the Presidential elections of 1856 and 1860, when the Whigs were replaced as a major party by the Republicans, no third party has posed a credible threat to the two major parties in Presidential elections.[132] Third parties have been completely incapable of matching the major parties' ability to raise money and win elections. Congress was, of course, aware of this fact of American life, and thus was justified in providing both major parties full funding and all other parties only a percentage of the major-party entitlement.[133] Identical treatment of all parties, on the other hand, "would not only make it easy to raid the United States Treasury, it would also artificially foster the proliferation of splinter parties." 171 U. S. App. D. C., at 231, 519 F. 2d, at 881. The Constitution does not require the Government to "finance the efforts of every nascent political group," *American Party of Texas* v. *White*, 415 U. S., at 794, merely because Congress chose to finance the efforts of the major parties.

Furthermore, appellants have made no showing that

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[132] In 1912 Theodore Roosevelt ran as the candidate of the Progressive Party, which had split off from the Republican Party, and he received more votes than William H. Taft, the Republican candidate. But this third-party "threat" was short-lived; in 1916 the Progressives came back into the Republican Party when the party nominated Charles Evans Hughes as its candidate for the Presidency. With the exception of 1912, the major-party candidates have outpolled all others in every Presidential election since 1856.

[133] Appellants suggest that a less discriminatory formula would be to grant full funding to the candidate of the party getting the most votes in the last election and then give money to candidates of other parties based on their showing in the last election relative to the "leading" party. That formula, however, might unfairly favor incumbents, since their major-party challengers would receive less financial assistance. See S. Rep. No. 93–689, p. 10 (1974).

the election funding plan disadvantages nonmajor parties by operating to reduce their strength below that attained without any public financing. First, such parties are free to raise money from private sources,[134] and by our holding today new parties are freed from any expenditure limits, although admittedly those limits may be a largely academic matter to them. But since any major-party candidate accepting public financing of a campaign voluntarily assents to a spending ceiling, other candidates will be able to spend more in relation to the major-party candidates. The relative position of minor parties that do qualify to receive some public funds because they received 5% of the vote in the previous Presidential election is also enhanced. Public funding for candidates of major parties is intended as a substitute for private contributions; but for minor-party candidates [135] such assistance may be viewed as a supplement to private contributions since these candidates may continue to solicit private funds up to the applicable spending limit. Thus, we conclude that the general election funding system does not work an invidious discrimination against candidates of nonmajor parties.

Appellants challenge reliance on the vote in past elections as the basis for determining eligibility. That challenge is foreclosed, however, by our holding in *Jenness* v. *Fortson*, 403 U. S., at 439–440, that popular vote totals in the last election are a proper measure of public sup-

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[134] Appellants argue that this effort to "catch up" is hindered by the contribution limits in 18 U. S. C. § 608 (b) (1970 ed., Supp. IV) and that therefore the public financing provisions are unconstitutional. Whatever merit the point may have, which is questionable on the basis of the record before the Court, it is answered in our treatment of the contribution limits. See Part I–B, *supra*.

[135] There will, however, be no minor-party candidates in the 1976 Presidential election, since no 1972 candidate other than those of the major parties received 5% of the popular vote.

port. And Congress was not obliged to select instead from among appellants' suggested alternatives. Congress could properly regard the means chosen as preferable, since the alternative of petition drives presents cost and administrative problems in validating signatures, and the alternative of opinion polls might be thought inappropriate since it would involve a Government agency in the business of certifying polls or conducting its own investigation of support for various candidates, in addition to serious problems with reliability.[136]

Appellants next argue, relying on the ballot-access decisions of this Court, that the absence of any alternative means of obtaining pre-election funding renders the scheme unjustifiably restrictive of minority political interests. Appellants' reliance on the ballot-access decisions is misplaced. To be sure, the regulation sustained in *Jenness* v. *Fortson*, for example, incorporated alternative means of qualifying for the ballot, 403 U. S., at 440, and the lack of an alternative was a defect in the scheme struck down in *Lubin* v. *Panish*, 415 U. S., at 718. To

[136] Another suggested alternative is Senator Metcalf's voucher scheme, but we have previously mentioned problems presented by that device. See n. 125, *supra*. The United States suggests that a matching formula could be used for general election funding, as it is for funding primary campaigns, in order to relate current funding to current support more closely. Congress could readily have concluded, however, that the matching formula was inappropriate for the general election. The problems in determining the relative strength of candidates at the primaries stage of the campaign are far greater than after a candidate has obtained the nomination of a major party. See S. Rep. No. 93-689, p. 6 (1974). It might be eminently reasonable, therefore, to employ a matching formula for primary elections related to popular support evidenced by numerous smaller contributions, yet inappropriate for general election financing as inconsistent with the congressional effort to remove the influence of private contributions and to relieve candidates of the burden of fundraising. *Ibid.*

suggest, however, that the constitutionality of Subtitle H therefore hinges solely on whether some alternative is afforded overlooks the rationale of the operative constitutional principles. Our decisions finding a need for an alternative means turn on the nature and extent of the burden imposed in the absence of available alternatives. We have earlier stated our view that Chapter 95 is far less burdensome upon and restrictive of constitutional rights than the regulations involved in the ballot-access cases. See *supra*, at 94–95. Moreover, expenditure limits for major parties and candidates may well improve the chances of nonmajor parties and their candidates to receive funds and increase their spending. Any risk of harm to minority interests is speculative due to our present lack of knowledge of the practical effects of public financing and cannot overcome the force of the governmental interests against use of public money to foster frivolous candidacies, create a system of splintered parties, and encourage unrestrained factionalism.

Appellants' reliance on the alternative-means analyses of the ballot-access cases generally fails to recognize a significant distinction from the instant case. The primary goal of all candidates is to carry on a successful campaign by communicating to the voters persuasive reasons for electing them. In some of the ballot-access cases the States afforded candidates alternative means for qualifying for the ballot, a step in any campaign that, with rare exceptions, is essential to successful effort. Chapter 95 concededly provides only one method of obtaining pre-election financing; such funding is, however, not as necessary as being on the ballot. See n. 128, *supra*. Plainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, and this avenue is still open to all candidates. And, after all, the important achievements of mi-

nority political groups in furthering the development of American democracy [137] were accomplished without the help of public funds. Thus, the limited participation or nonparticipation of nonmajor parties or candidates in public funding does not unconstitutionally disadvantage them.

Of course, nonmajor parties and their candidates may qualify for post-election participation in public funding and in that sense the claimed discrimination is not total. Appellants contend, however, that the benefit of any such participation is illusory due to § 9004 (c), which bars the use of the money for any purpose other than paying campaign expenses or repaying loans that had been used to defray such expenses. The only meaningful use for post-election funds is thus to repay loans; but loans, except from national banks, are "contributions" subject to the general limitations on contributions, 18 U. S. C. § 591 (e) (1970 ed., Supp. IV). Further, they argue, loans are not readily available to nonmajor parties or candidates before elections to finance their campaigns. Availability of post-election funds therefore assertedly gives them nothing. But in the nature of things the willingness of lenders to make loans will depend upon the pre-election probability that the candidate and his party will attract 5% or more of the voters. When a reasonable prospect of such support appears, the party and candidate may be an acceptable loan risk since the prospect of post-election participation in public funding will be good.[138]

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[137] *Williams* v. *Rhodes*, 393 U. S. 23, 31–32 (1968); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250–251 (1957) (plurality opinion). Cf. *Talley* v. *California*, 362 U. S. 60, 64 (1960).

[138] Apart from the adjustment for inflation, and assuming a major-party entitlement of $20,000,000, a candidate getting 5% of the popular vote, when the balance is divided between two major parties, would be entitled to a post-election payment of more than $2,100,000 if that sum remains after priority allocations from the fund.

Finally, appellants challenge the validity of the 5% threshold requirement for general election funding. They argue that, since most state regulations governing ballot access have threshold requirements well below 5%, and because in their view the 5% requirement here is actually stricter than that upheld in *Jenness* v. *Fortson*, 403 U. S. 431 (1971),[139] the requirement is unreasonable. We have already concluded that the restriction under Chapter 95 is generally less burdensome than ballot-access regulations. *Supra*, at 94–95. Further, the Georgia provision sustained in *Jenness* required the candidate to obtain the signatures of 5% of all eligible voters, without regard to party. To be sure, the public funding formula does not permit anyone who voted for another party in the last election to be part of a candidate's 5%. But under Chapter 95 a Presidential candidate needs only 5% or more of the actual vote, not the larger universe of eligible voters. As a result, we cannot say that Chapter 95 is numerically more, or less, restrictive than the regulation in *Jenness*. In any event, the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make. See *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 41 (1928) (Holmes, J., dissenting); n. 111, *supra*. Without any doubt a range of formulations would sufficiently protect the public fisc and not foster factionalism, and would also recognize the public interest in the fluidity of our political

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[139] It is also argued that *Storer* v. *Brown*, 415 U. S. 724 (1974), is a better analogy than *Jenness*. In *Storer* a candidate could qualify for the ballot by obtaining the signatures of 5% of the voters, but the signatures could not include any voters who voted for another candidate at the primary election. 415 U. S., at 739. The analogy, however, is no better than *Jenness*. The Chapter 95 formula is not more restrictive than that sustained in the two cases, since for the reasons stated earlier, *supra*, at 94–95, it burdens minority interests less than ballot-access regulations.

affairs. We cannot say that Congress' choice falls without the permissible range.[140]

2. Nominating Convention Financing

The foregoing analysis and reasoning sustaining general election funding apply in large part to convention funding under Chapter 95 and suffice to support our rejection of appellants' challenge to these provisions. Funding of party conventions has increasingly been derived from large private contributions, see H. R. Rep. No. 93–1239, p. 14 (1974), and the governmental interest in eliminating this reliance is as vital as in the case of private contributions to individual candidates. The expenditure limitations on major parties participating in public financing enhance the ability of nonmajor parties to increase their spending relative to the major parties; further, in soliciting private contributions to finance conventions, parties are not subject to the $1,000 contribution limit pertaining to candidates.[141] We therefore conclude that appellants' constitutional challenge to the

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[140] On similar grounds we sustain the 10-state requirement in § 9002 (2). Success in Presidential elections depends on winning electoral votes in States, not solely popular votes, and the requirement is plainly not unreasonable in light of that fact.

[141] As with primary campaigns, Congress could reasonably determine that there was no need for reforms as to minor-party conventions. See *infra*, at 105–106. This contribution limit applies to "contributions to any candidate," 18 U. S. C. § 608 (b)(1) (1970 ed., Supp. IV), and thus would not govern gifts to a party for general purposes, such as convention funding. Although "contributions to a named candidate made to any political committee" are within § 608 (b)(1) if the committee is authorized in writing by a candidate to accept contributions, § 608 (b)(4)(A), contributions to a party not for the benefit of any specific candidate would apparently not be subject to the $1,000 ceiling. Moreover, § 608 (b)(4)(A) governs only party organizations authorized by a candidate in writing to accept contributions.

provisions for funding nominating conventions must also be rejected.

3. Primary Election Campaign Financing

Appellants' final challenge is to the constitutionality of Chapter 96, which provides funding of primary campaigns. They contend that these provisions are constitutionally invalid (1) because they do not provide funds for candidates not running in party primaries [142] and (2) because the eligibility formula actually increases the influence of money on the electoral process. In not providing assistance to candidates who do not enter party primaries, Congress has merely chosen to limit at this time the reach of the reforms encompassed in Chapter 96. This Congress could do without constituting the reforms a constitutionally invidious discrimination. The governing principle was stated in *Katzenbach* v. *Morgan,* 384 U. S. 641, 657 (1966):

> "[I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Roschen* v. *Ward,* 279 U. S. 337, 339, that a legislature need not 'strike at all evils at the same time,' *Semler* v. *Dental Examiners,* 294 U. S. 608, 610, and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489." [143]

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[142] With respect to the denial of funds to candidates who may not be affiliated with a "political party" for the purposes of public financing, see n. 118, *supra.*

[143] Appellants argue that this reasoning from *Katzenbach* v. *Morgan,* is inapplicable to this case involving First Amendment guarantees. But the argument as to the denial of funds to certain

The choice to limit matching funds to candidates running in primaries may reflect that concern about large private contributions to candidates centered on primary races and that there is no historical evidence of similar abuses involving contributions to candidates who engage in petition drives to qualify for state ballots. Moreover, assistance to candidates and nonmajor parties forced to resort to petition drives to gain ballot access implicates the policies against fostering frivolous candidacies, creating a system of splintered parties, and encouraging unrestrained factionalism.

The eligibility requirements in Chapter 96 are surely not an unreasonable way to measure popular support for a candidate, accomplishing the objective of limiting subsidization to those candidates with a substantial chance of being nominated. Counting only the first $250 of each contribution for eligibility purposes requires candidates to solicit smaller contributions from numerous people. Requiring the money to come from citizens of a minimum number of States eliminates candidates whose appeal is limited geographically; a President is elected not by popular vote, but by winning the popular vote in enough States to have a majority in the Electoral College. [144]

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candidates primarily claims invidious discrimination and hence presents Fifth Amendment questions, though with First Amendment overtones, as in *Katzenbach* v. *Morgan*.

[144] Appellants contend that the 20-state requirement directly conflicts with *Moore* v. *Ogilvie*, 394 U. S. 814 (1969), but that case is distinguishable. Only 7% of the Illinois voters could have blocked a candidate from qualifying for the ballot, even though the statewide elections were decided by straight majority vote. The clear purpose was to keep any person from being nominated without support in downstate counties making up only 7% of the vote, but those same voters could not come close to defeating a candidate in the general election. There is no similar restriction here on the opportunity to vote for any candidate, and the 20-state requirement is not an

We also reject as without merit appellants' argument that the matching formula favors wealthy voters and candidates. The thrust of the legislation is to reduce financial barriers [145] and to enhance the importance of smaller contributions.[146] Some candidates undoubtedly could raise large sums of money and thus have little need for public funds, but candidates with lesser fundraising capabilities will gain substantial benefits from matching funds. In addition, one eligibility requirement for

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unreasonable method of measuring a candidate's breadth of support. See *supra*, at 103–105.

[145] The fear that barriers would be reduced too much was one reason for rejecting a matching formula for the general election financing system. See n. 136, *supra*.

[146] By offering a single hypothetical situation, appellants try to prove that the matching formula gives wealthy contributors an advantage. Taxpayers are entitled to a deduction from ordinary income for political contributions up to $100, or $200 on a joint return. § 218. Appellants note that a married couple in the 70% tax bracket could give $500 to a candidate and claim the full deduction allowed by § 218, thus reducing their tax liability by $140. The matching funds increase the effective contribution to $1,000, and the total cost to the contributors is $360. But the appellants have disregarded a myriad of other possibilities. For example, taxpayers also have the option of claiming a tax credit up to $25, or $50 on a joint return, for one-half of their political contributions. § 41. Any married couple could give $100 to a candidate, claim the full $50 credit, and matching thus allows a contribution of $200 at a cost of only $50 to the contributors. Because this example and others involve greater subsidization—75% against 64%—of smaller contributions than is involved in appellants' hypothesis, one cannot say that the matching formula unfairly favors wealthy interests or large contributors. Moreover, the effect noted by appellants diminishes as the size of individual contributions approaches $1,000.

Finally, these examples clearly reveal that §§ 41 and 218 afford public subsidies for candidates, but appellants have raised no constitutional challenge to the provisions, either on First or Fifth Amendment grounds.

matching funds is acceptance of an expenditure ceiling, and candidates with little fundraising ability will be able to increase their spending relative to candidates capable of raising large amounts in private funds.

For the reasons stated, we reject appellants' claims that Subtitle H is facially unconstitutional.[147]

C. Severability

The only remaining issue is whether our holdings invalidating 18 U. S. C. §§ 608 (a), (c), and (e)(1) (1970 ed., Supp. IV) require the conclusion that Subtitle H is unconstitutional. There is, of course, a relationship between the spending limits in § 608 (c) and the public financing provisions; the expenditure limits accepted by a candidate to be eligible for public funding are identical to the limits in § 608 (c). But we have no difficulty in concluding that Subtitle H is severable. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champ-*

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[147] Our responses to the certified constitutional questions pertaining to public financing of Presidential election campaigns are:

5. Does any statutory provision for the public financing of political conventions or campaigns for nomination or election to the Presidency or Vice Presidency violate the rights of one or more of the plaintiffs under the First or Ninth Amendment, the Due Process Clause of the Fifth Amendment, or Article I, Section 8, Clause 1, of the Constitution of the United States?

Answer: NO.

6. Do the particular provisions of Subtitle H and § 6096 of the Internal Revenue Code of 1954 deprive one or more of the plaintiffs of such rights under the First or Ninth Amendment or Article 1, Section 8, Clause 1, in that they provide federal tax money to support certain political candidates, parties, movements, and organizations or in the manner that they so provide such federal tax money?

Answer: NO.

lin Refining Co. v. *Corporation Commission*, 286 U. S. 210, 234 (1932). Our discussion of "what is left" leaves no doubt that the value of public financing is not dependent on the existence of a generally applicable expenditure limit. We therefore hold Subtitle H severable from those portions of the legislation today held constitutionally infirm.

IV. THE FEDERAL ELECTION COMMISSION

The 1974 amendments to the Act create an eight-member Federal Election Commission (Commission) and vest in it primary and substantial responsibility for administering and enforcing the Act. The question that we address in this portion of the opinion is whether, in view of the manner in which a majority of its members are appointed, the Commission may under the Constitution exercise the powers conferred upon it. We find it unnecessary to parse the complex statutory provisions in order to sketch the full sweep of the Commission's authority. It will suffice for present purposes to describe what appear to be representative examples of its various powers.

Chapter 14 of Title 2 [148] makes the Commission the principal repository of the numerous reports and statements which are required by that chapter to be filed by those engaging in the regulated political activities. Its duties under § 438 (a) with respect to these reports and statements include filing and indexing, making them available for public inspection, preservation, and auditing and field investigations. It is directed to "serve as a national clearinghouse for information in respect to the administration of elections." § 438 (b).

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[148] Unless otherwise indicated, all statutory citations in Part IV are to Title 2 of the United States Code, 1970 edition, Supplement IV, the relevant provisions of which are set forth in the Appendix to this opinion, *infra*, at 144–180.

Beyond these recordkeeping, disclosure, and investigative functions, however, the Commission is given extensive rulemaking and adjudicative powers. Its duty under § 438 (a)(10) is "to prescribe suitable rules and regulations to carry out the provisions of . . . chapter [14]." Under § 437d (a)(8) the Commission is empowered to make such rules "as are necessary to carry out the provisions of this Act." [149] Section 437d (a)(9) authorizes it to "formulate general policy with respect to the administration of this Act" and enumerated sections of Title 18's Criminal Code,[150] as to all of which provisions the Commission "has primary jurisdiction with respect to [their] civil enforcement." § 437c (b).[151] The Commission is authorized under § 437f (a) to render advisory opinions with respect to activities possibly violating the Act, the Title 18 sections, or the campaign funding provisions of Title 26,[152] the effect of which is that "[n]ot-

[149] In administering Chapters 95 and 96 of Title 26, which provide for funding of Presidential election and primary campaigns, respectively, the Commission is empowered, *inter alia*, "to prescribe such rules and regulations . . . as it deems necessary to carry out the functions and duties imposed on it" by each chapter. 26 U. S. C. § 9009 (b) (1970 ed., Supp. IV). See also 26 U. S. C. § 9039 (b) (1970 ed., Supp. IV).

[150] The sections from Title 18, incorporated by reference into several of the provisions relating to the Commission's powers, were either enacted or amended by the 1971 Act or the 1974 amendments. They are codified at 18 U. S. C. §§ 608, 610, 611, 613, 614, 615, 616, and 617 (1970 ed., Supp. IV) (hereinafter referred to as Title 18 sections).

[151] Section 437c (b) also provides, somewhat redundantly, that the Commission "shall administer, seek to obtain compliance with, and formulate policy with respect to this Act" and the Title 18 sections.

[152] The Commission is charged with the duty under each Act to receive and pass upon requests by eligible candidates for campaign money and certify them to the Secretary of the Treasury for the latter's disbursement from the Fund. See 26 U. S. C. §§ 9003–9007, 9033–9038 (1970 ed., Supp. IV).

withstanding any other provision of law, any person with respect to whom an advisory opinion is rendered . . . who acts in good faith in accordance with the provisions and findings [thereof] shall be presumed to be in compliance with the [statutory provision] with respect to which such advisory opinion is rendered." § 437f (b). In the course of administering the provisions for Presidential campaign financing, the Commission may authorize convention expenditures which exceed the statutory limits. 26 U. S. C. § 9008 (d)(3) (1970 ed., Supp. IV).

The Commission's enforcement power is both direct and wide ranging. It may institute a civil action for (i) injunctive or other relief against "any acts or practices which constitute or will constitute a violation of this Act," § 437g (a)(5); (ii) declaratory or injunctive relief "as may be appropriate to implement or con[s]true any provisions" of Chapter 95 of Title 26, governing administration of funds for Presidential election campaigns and national party conventions, 26 U. S. C. § 9011 (b)(1) (1970 ed., Supp. IV); and (iii) "such injunctive relief as is appropriate to implement any provision" of Chapter 96 of Title 26, governing the payment of matching funds for Presidential primary campaigns, 26 U. S. C. § 9040 (c) (1970 ed., Supp. IV). If after the Commission's post-disbursement audit of candidates receiving payments under Chapter 95 or 96 it finds an overpayment, it is empowered to seek repayment of all funds due the Secretary of the Treasury. 26 U. S. C. §§ 9010 (b), 9040 (b) (1970 ed., Supp. IV). In no respect do the foregoing civil actions require the concurrence of or participation by the Attorney General; conversely, the decision not to seek judicial relief in the above respects would appear to rest solely with the Commission.[153] With respect to the

[153] This conclusion seems to follow from the manner in which the subsections of § 437g interrelate. Any person may file, and the

referenced Title 18 sections, § 437g (a)(7) provides that if, after notice and opportunity for a hearing before it, the Commission finds an actual or threatened criminal violation, the Attorney General "upon request by the Commission . . . shall institute a civil action for relief." Finally, as "[a]dditional enforcement authority," § 456 (a) authorizes the Commission, after notice and opportunity for hearing, to make "a finding that a person . . . while a candidate for Federal office, failed to file" a required report of contributions or expenditures. If that finding is made within the applicable limitations period

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Clerk of the House or the Secretary of the Senate shall refer, believed or apparent civil or criminal violations to the Commission. Upon receipt of a complaint or referral, as the case may be, the Commission is directed to notify the person involved and to report the violation to the Attorney General *or* to make an investigation. § 437g (a)(2). The Commission shall conduct a hearing at that person's request. § 437g (a)(4). If after its investigation the Commission "determines . . . that there is reason to believe" that a "violation of this Act," *i. e.*, a civil violation, has occurred or is about to occur, it "may endeavor to correct such violation by informal methods," failing which, the Commission "may institute a civil action for relief." § 437g (a)(5). Finally, paragraph (6) provides as follows:

"The Commission shall refer apparent violations to the appropriate law enforcement authorities to the extent that violations of provisions of chapter 29 of Title 18 are involved, *or* if the Commission is unable to correct *apparent* violations of *this Act* under the authority given it by paragraph (5), *or* if the Commission determines that any such referral is appropriate." § 437g (a)(6) (emphasis added).

While it is clear that the Commission has a duty to refer apparent criminal violations either upon their initial receipt or after an investigation, it would appear at the very least that the Commission, which has "primary jurisdiction" with respect to civil enforcement, § 437c (b), has the sole discretionary power "to determine" whether or not a civil violation has occurred or is about to occur, and consequently whether or not informal or judicial remedies will be pursued.

for prosecutions, the candidate is thereby "disqualified from becoming a candidate in any future election for Federal office for a period of time beginning on the date of such finding and ending one year after the expiration of the term of the Federal office for which such person was a candidate." [154]

The body in which this authority is reposed consists of eight members.[155] The Secretary of the Senate and the Clerk of the House of Representatives are *ex officio* members of the Commission without the right to vote. Two members are appointed by the President *pro tempore* of the Senate "upon the recommendations of the majority leader of the Senate and the minority leader of the Senate." [156] Two more are to be appointed by the Speaker of the House of Representatives, likewise upon the recommendations of its respective majority and minority leaders. The remaining two members are appointed by the President. Each of the six voting members of the Commission must be confirmed by the majority of both Houses of Congress, and each of the three appointing authorities is forbidden to choose both of their appointees from the same political party.

A. Ripeness

Appellants argue that given the Commission's extensive powers the method of choosing its members under § 437c (a)(1) runs afoul of the separation of powers embedded in the Constitution, and urge that as presently constituted the Commission's "existence be held unconstitutional by this Court." Before embarking on this or any

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[154] Such a finding is subject to judicial review under the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*

[155] § 437c (a)(1), set forth in the Appendix to this opinion, *infra*, at 161–162.

[156] § 437c (a)(1)(A).

related inquiry, however, we must decide whether these issues are properly before us. Because of the Court of Appeals' emphasis on lack of "ripeness" of the issue relating to the method of appointment of the members of the Commission, we find it necessary to focus particularly on that consideration in this section of our opinion.

We have recently recognized the distinction between jurisdictional limitations imposed by Art. III and "[p]roblems of prematurity and abstractness" that may prevent adjudication in all but the exceptional case. *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583, 588 (1972). In *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 140 (1974), we stated that "ripeness is peculiarly a question of timing," and therefore the passage of months between the time of the decision of the Court of Appeals and our present ruling is of itself significant. We likewise observed in the *Reorganization Act Cases:*

> "Thus, occurrence of the conveyance allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative. Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Id.*, at 143.

The Court of Appeals held that of the five specific certified questions directed at the Commission's authority, only its powers to render advisory opinions and to authorize excessive convention expenditures were ripe for adjudication. The court held that the remaining aspects of the Commission's authority could not be adjudicated because "[in] its present stance, this litigation does not present the court with the concrete facts that are neces-

sary to an informed decision." [157] 171 U. S. App. D. C., at 244, 519 F. 2d, at 893.

Since the entry of judgment by the Court of Appeals,

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[157] The Court of Appeals, following the sequence of the certified questions, adopted a piecemeal approach to the six questions, reproduced below, concerning the method of appointment and powers of the Commission. Its basic holding, in answer to question 8 (a), was that "Congress has the constitutional authority to establish and appoint [the Commission] to carry out appropriate legislative functions." 171 U. S. App. D. C., at 244, 519 F. 2d, at 890. Appellants' claim, embodied in questions 8 (b) through 8 (f), that the Commission's powers go well beyond "legislative functions" and are facially invalid was in an overarching sense not ripe, since "[w]hether particular powers are predominantly executive or judicial, or insufficiently related to the exercise of appropriate legislative power is an abstract question . . . better decided in the context of a particular factual controversy." *Id.*, at 243, 519 F. 2d, at 892. While some of the statutory grants such as civil enforcement and candidate disqualification powers (questions 8 (c) and 8 (e)) raised, in the court's view, "very serious constitutional questions," only the power of the Commission to issue advisory opinions under § 437f (a) was ripe in the context of an attack on Congress' method of appointment. Even then, beyond the Commission's power to inform the public of its interpretations, the question whether Congress under § 437f (b) could validly give substantive *effect* to the Commission's opinions in later civil and criminal enforcement proceedings should, the Court of Appeals held, await a case in which a defense based on § 437f (b) was asserted. Finally, the question of the Commission's power under 26 U. S. C. § 9008 (d)(3) (1970 ed., Supp. IV) to authorize nominating convention expenditures in excess of the statutory limits (question 8 (f)) was found ripe because appellants had not challenged it in relation to the method of appointment but had asserted only that 26 U. S. C. § 9008 (d)(3) (1970 ed., Supp. IV) vested excessive discretion in the Commission. The Court of Appeals found that Congress had provided sufficient guidelines to withstand that attack.

The Court of Appeals accordingly answered the six certified questions as follows:

"8. Do the provisions in the challenged statutes concerning the powers and method of appointment of the Federal Election Com-

the Commission has undertaken to issue rules and regulations under the authority of § 438 (a)(10). While many of its other functions remain as yet unexercised, the date of their all but certain exercise is now closer

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mission violate the rights of one or more of the plaintiffs under the constitutional separation of powers, the First, Fourth, Fifth, Sixth, or Ninth Amendment, Article I, Section 2, Clause 6, Article I, Section 5, Clause 1, or Article III?

"(a) Does 2 U. S. C. § 437c (a) violate such rights by the method of appointment of the Federal Election Commission? . . .

"Answer: NO

"(b) Do 2 U. S. C. §§ 437d and 437g violate such rights, in that they entrust administration and enforcement of the FECA to the Federal Election Commission? . . .

"Answer: NO as to the power to issue advisory opinions; UNRIPE as to all else.

"(c) Does 2 U. S. C. § 437g (a) violate such rights, in that it empowers the Federal Election Commission and the Attorney General to bring civil actions (including proceedings for injunctions) against any person who has engaged or who may engage in acts or practices which violate the Federal Election Campaign Act, *as amended,* or §§ 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18? . . .

"Answer: UNRIPE FOR RESOLUTION

"(d) Does 2 U. S. C. § 438 (c) violate such rights, in that it empowers the Federal Election Commission to make rules under the FECA in the manner specified therein? . . .

"Answer: UNRIPE FOR RESOLUTION

"(e) Does 2 U. S. C. § 456 violate such rights, in that it imposes a temporary disqualification on any candidate for election to federal office who is found by the Federal Election Commission to have failed to file a report required by Title III of the Federal Election Campaign Act, *as amended?* . . .

"Answer: UNRIPE FOR RESOLUTION

"(f) Does § 9008 of the Internal Revenue Code of 1954 violate such rights, in that it empowers the Federal Election Commission to authorize expenditures of the national committee of a party with respect to presidential nominating conventions in excess of the limits enumerated therein? . . .

"Answer: NO"

by several months than it was at the time the Court of Appeals ruled. Congress was understandably most concerned with obtaining a final adjudication of as many issues as possible litigated pursuant to the provisions of § 437h. Thus, in order to decide the basic question whether the Act's provision for appointment of the members of the Commission violates the Constitution, we believe we are warranted in considering all of those aspects of the Commission's authority which have been presented by the certified questions.[158]

Party litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights. *Palmore* v. *United States,* 411 U. S. 389 (1973); *Glidden Co.* v. *Zdanok,* 370 U. S. 530 (1962); *Coleman* v. *Miller,* 307 U. S. 433 (1939). In *Glidden,* of course, the challenged adjudication had already taken place, whereas in this case appellants' claim is of impending future rulings and determinations by the Commission. But this is a question of ripeness, rather than lack of case or controversy under Art. III, and for the reasons to which we have previously

[158] With respect to the Commission's power under 26 U. S. C. § 9008 (d)(3) (1970 ed., Supp. IV) to authorize excessive convention expenditures (question 8 (f)), the fact that appellants in the Court of Appeals may have focused their attack primarily or even exclusively upon the asserted lack of standards attendant to that power, see n. 157, *supra,* does not foreclose them from challenging that power in relation to Congress' method of appointment of the Commission's members. Question 8 (f) asks whether vesting the Commission with this power under 26 U. S. C. § 9008 (1970 ed., Supp. IV) violates "such rights," which by reference to question 8 includes "the rights of [appellants] under the constitutional separation of powers." Since the certified questions themselves provide our jurisdictional framework, § 437h (b), the separation-of-powers aspect of appellants' attack on 26 U. S. C. § 9008 (d)(3) (1970 ed., Supp. IV) is properly before this Court.

adverted we hold that appellants' claims as they bear upon the method of appointment of the Commission's members may be presently adjudicated.

B. The Merits

Appellants urge that since Congress has given the Commission wide-ranging rulemaking and enforcement powers with respect to the substantive provisions of the Act, Congress is precluded under the principle of separation of powers from vesting in itself the authority to appoint those who will exercise such authority. Their argument is based on the language of Art. II, § 2, cl. 2, of the Constitution, which provides in pertinent part as follows:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Appellants' argument is that this provision is the exclusive method by which those charged with executing the laws of the United States may be chosen. Congress, they assert, cannot have it both ways. If the Legislature wishes the Commission to exercise all of the conferred powers, then its members are in fact "Officers of the United States" and must be appointed under the Appointments Clause. But if Congress insists upon retaining the power to appoint, then the members of the Commission may not discharge those many functions of the Commission which can be performed only by "Officers of

the United States," as that term must be construed within the doctrine of separation of powers.

Appellee Commission and *amici* in support of the Commission urge that the Framers of the Constitution, while mindful of the need for checks and balances among the three branches of the National Government, had no intention of denying to the Legislative Branch authority to appoint its own officers. Congress, either under the Appointments Clause or under its grants of substantive legislative authority and the Necessary and Proper Clause in Art. I, is in their view empowered to provide for the appointment to the Commission in the manner which it did because the Commission is performing "appropriate legislative functions."

The majority of the Court of Appeals recognized the importance of the doctrine of separation of powers which is at the heart of our Constitution, and also recognized the principle enunciated in *Springer* v. *Philippine Islands*, 277 U. S. 189 (1928), that the Legislative Branch may not exercise executive authority by retaining the power to appoint those who will execute its laws. But it described appellants' argument based upon Art. II, § 2, cl. 2, as "strikingly syllogistic," and concluded that Congress had sufficient authority under the Necessary and Proper Clause of Art. I of the Constitution not only to establish the Commission but to appoint the Commission's members. As we have earlier noted, it upheld the constitutional validity of congressional vesting of certain authority in the Commission, and concluded that the question of the constitutional validity of the vesting of its remaining functions was not yet ripe for review. The three dissenting judges in the Court of Appeals concluded that the method of appointment for the Commission did violate the doctrine of separation of powers.

1. Separation of Powers

We do not think appellants' arguments based upon Art. II, § 2, cl. 2, of the Constitution may be so easily dismissed as did the majority of the Court of Appeals. Our inquiry of necessity touches upon the fundamental principles of the Government established by the Framers of the Constitution, and all litigants and all of the courts which have addressed themselves to the matter start on common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another.

James Madison, writing in the Federalist No. 47,[159] defended the work of the Framers against the charge that these three governmental powers were not *entirely* separate from one another in the proposed Constitution. He asserted that while there was some admixture, the Constitution was nonetheless true to Montesquieu's well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct:

> "The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. 'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.' Some of these reasons

[159] The Federalist No. 47, p. 299 (G. P. Putnam's Sons ed. 1908).

> are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author." [160]

Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government. The President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress. The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President. The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.

Mr. Chief Justice Taft, writing for the Court in *Hampton & Co.* v. *United States*, 276 U. S. 394 (1928), after stating the general principle of separation of powers found in the United States Constitution, went on to observe:

> "[T]he rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power

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[160] *Id.*, at 302–303 (emphasis in original).

> and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *Id.*, at 406.

More recently, Mr. Justice Jackson, concurring in the opinion and the judgment of the Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952), succinctly characterized this understanding:

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other. As Madison put it in Federalist No. 51:

> "This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the

> several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State." [161]

This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it. The Court has held that executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution. *United States* v. *Ferreira*, 13 How. 40 (1852); *Hayburn's Case*, 2 Dall. 409 (1792). The Court has held that the President may not execute and exercise legislative authority belonging only to Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra.* In the course of its opinion in that case, the Court said:

> "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States . . . .'" 343 U. S., at 587–588.

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[161] The Federalist No. 51, pp. 323–324 (G. P. Putnam's Sons ed. 1908).

More closely in point to the facts of the present case is this Court's decision in *Springer* v. *Philippine Islands*, 277 U. S. 189 (1928), where the Court held that the legislature of the Philippine Islands could not provide for legislative appointment to executive agencies.

2. The Appointments Clause

The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787. Article I, § 1, declares: "All legislative Powers herein granted shall be vested in a Congress of the United States." Article II, § 1, vests the executive power "in a President of the United States of America," and Art. III, § 1, declares that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The further concern of the Framers of the Constitution with maintenance of the separation of powers is found in the so-called "Ineligibility" and "Incompatibility" Clauses contained in Art. I, § 6:

> "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

It is in the context of these cognate provisions of the document that we must examine the language of Art. II, § 2, cl. 2, which appellants contend provides the only authorization for appointment of those to whom substantial executive or administrative authority is given

by statute. Because of the importance of its language, we again set out the provision:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing "Officers of the United States," but the drafters had a less frivolous purpose in mind. This conclusion is supported by language from *United States* v. *Germaine*, 99 U. S. 508, 509–510 (1879):

> "The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. *That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.*" (Emphasis supplied.)

We think that the term "Officers of the United States"

as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States* v. *Germaine, supra,* is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.

If "all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment," *United States* v. *Germaine, supra,* it is difficult to see how the members of the Commission may escape inclusion. If a postmaster first class, *Myers* v. *United States,* 272 U. S. 52 (1926), and the clerk of a district court, *Ex parte Hennen,* 13 Pet. 230 (1839), are inferior officers of the United States within the meaning of the Appointments Clause, as they are, surely the Commissioners before us are at the very least such "inferior Officers" within the meaning of that Clause.[162]

Although two members of the Commission are initially selected by the President, his nominations are subject to confirmation not merely by the Senate, but by the House of Representatives as well. The remaining four voting members of the Commission are appointed by the President *pro tempore* of the Senate and by the Speaker of the House. While the second part of the Clause

[162] *"Officers of the United States"* does not include all employees of the United States, but there is no claim made that the Commissioners are employees of the United States rather than officers. Employees are lesser functionaries subordinate to officers of the United States, see *Auffmordt* v. *Hedden,* 137 U. S. 310, 327 (1890); *United States* v. *Germaine,* 99 U. S. 508 (1879), whereas the Commissioners, appointed for a statutory term, are not subject to the control or direction of any other executive, judicial, or legislative authority.

authorizes Congress to vest the appointment of the officers described in that part in "the Courts of Law, or in the Heads of Departments," neither the Speaker of the House nor the President *pro tempore* of the Senate comes within this language.

The phrase "Heads of Departments," used as it is in conjunction with the phrase "Courts of Law," suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch. While the Clause expressly authorizes Congress to vest the appointment of certain officers in the "Courts of Law," the absence of similar language to include Congress must mean that neither Congress nor its officers were included within the language "Heads of Departments" in this part of cl. 2.

Thus with respect to four of the six voting members of the Commission, neither the President, the head of any department, nor the Judiciary has any voice in their selection.

The Appointments Clause specifies the method of appointment only for "Officers of the United States" whose appointment is not "otherwise provided for" in the Constitution. But there is no provision of the Constitution remotely providing any alternative means for the selection of the members of the Commission or for anybody like them. Appellee Commission has argued, and the Court of Appeals agreed, that the Appointments Clause of Art. II should not be read to exclude the "inherent power of Congress" to appoint its own officers to perform functions necessary to that body as an institution. But there is no need to read the Appointments Clause contrary to its plain language in order to reach the result sought by the Court of Appeals. Article I, § 3, cl. 5, expressly authorizes the selection of the President *pro tempore* of the Senate, and § 2, cl. 5, of that Article provides

for the selection of the Speaker of the House. Ranking nonmembers, such as the Clerk of the House of Representatives, are elected under the internal rules of each House [163] and are designated by statute as "officers of the Congress." [164] There is no occasion for us to decide whether any of these member officers are "Officers of the United States" whose "appointment" is otherwise provided for within the meaning of the Appointments Clause, since even if they were such officers their appointees would not be. Contrary to the fears expressed by the majority of the Court of Appeals, nothing in our holding with respect to Art. II, § 2, cl. 2, will deny to Congress "all power to appoint its own inferior officers to carry out appropriate legislative functions." [165]

Appellee Commission and *amici* contend somewhat obliquely that because the Framers had no intention of relegating Congress to a position below that of the coequal Judicial and Executive Branches of the National Government, the Appointments Clause must somehow be read to include Congress or its officers as among those

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[163] Rule II of the Rules of the House of Representatives, the earliest form of which was adopted in 1789, provides for the election by the House, at the commencement of each Congress, of a Clerk, Sergeant at Arms, Doorkeeper, Postmaster, and Chaplain, each of whom in turn is given appointment power over the employees of his department. Jefferson's Manual and Rules of the House of Representatives §§ 635–636. While there is apparently no equivalent rule on the Senate side, one of the first orders of business at the first session of the Senate, April 1789, was to elect a Secretary and a Doorkeeper. Senate Journal 10 (1st & 2d Congress 1789–1793).

[164] 2 U. S. C. § 60–1 (b).

[165] Appellee Commission has relied for analogous support on the existence of the Comptroller General, who as a "legislative officer" had significant duties under the 1971 Act. § 308, 86 Stat. 16. But irrespective of Congress' designation, cf. 31 U. S. C. § 65 (d), the Comptroller General is appointed by the President in conformity with the Appointments Clause. 31 U. S. C. § 42.

in whom the appointment power may be vested. But the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.[166] The debates during the Convention, and the evolution of the draft version of the Constitution, seem to us to lend considerable support to our reading of the language of the Appointments Clause itself.

An interim version of the draft Constitution had vested in the Senate the authority to appoint Ambassadors, public Ministers, and Judges of the Supreme Court, and the language of Art. II as finally adopted is a distinct change in this regard. We believe that it was a deliberate change made by the Framers with the intent to deny Congress any authority itself to appoint those who were "Officers of the United States." The debates on the floor of the Convention reflect at least in part the way the change came about.

On Monday, August 6, 1787, the Committee on Detail to which had been referred the entire draft of the Constitution reported its draft to the Convention, including the following two articles that bear on the question before us: [167]

> Article IX, § 1: "The Senate of the United States shall have power . . . to appoint Ambassadors, and Judges of the Supreme Court."
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> Article X, § 2: "[The President] shall commission all

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[166] 2 M. Farrand, The Records of the Federal Convention of 1787, pp. 74, 76 (1911); The Federalist No. 48, pp. 308–310 (G. P. Putnam's Sons ed. 1908) (J. Madison); The Federalist No. 71, pp. 447–448 (G. P. Putnam's Sons ed. 1908) (A. Hamilton). See generally Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983, 1029–1048 (1975).

[167] J. Madison, Notes of Debates in the Federal Convention of 1787, p. 385 (Ohio Univ. Press ed. 1966).

> the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution."

It will be seen from a comparison of these two articles that the appointment of Ambassadors and Judges of the Supreme Court was confided to the Senate, and that the authority to *appoint*—not merely nominate, but to actually appoint—all other officers was reposed in the President.

During a discussion of a provision in the same draft from the Committee on Detail which provided that the "Treasurer" of the United States should be chosen by both Houses of Congress, Mr. Read moved to strike out that clause, "leaving the appointment of the Treasurer *as of other officers* to the Executive." [168] Opposition to Read's motion was based, not on objection to the principle of executive appointment, but on the particular nature of the office of the "Treasurer." [169]

On Thursday, August 23, the Convention voted to insert after the word "Ambassadors" in the text of draft Art. IX the words "and other public Ministers." Immediately afterwards, the section as amended was referred to the "Committee of Five." [170] The following day the Convention took up Art. X. Roger Sherman objected to the draft language of § 2 because it conferred too much power on the President, and proposed to insert after the words "not otherwise provided for by this Constitution" the words "or by law." This motion was defeated by a vote of nine States to one.[171] On Septem-

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[168] *Id.*, at 472 (emphasis added).

[169] "Col. Mason in opposition to Mr. Read's motion desired it might be considered to whom the money would belong; if to the people, the legislature representing the people ought to appoint the keepers of it." *Ibid.*

[170] *Id.*, at 521.

[171] *Id.*, at 527.

ber 3 the Convention debated the Ineligibility and Incompatibility Clauses which now appear in Art. I, and made the Ineligibility Clause somewhat less stringent.[172]

Meanwhile, on Friday, August 31, a motion had been carried without opposition to refer such parts of the Constitution as had been postponed or not acted upon to a Committee of Eleven. Such reference carried with it both Arts. IX and X. The following week the Committee of Eleven made its report to the Convention, in which the present language of Art. II, § 2, cl. 2, dealing with the authority of the President to nominate is found, virtually word for word, as § 4 of Art. X.[173] The same Committee also reported a revised article concerning the Legislative Branch to the Convention. The changes are obvious. In the final version, the Senate is shorn of its power to appoint Ambassadors and Judges of the Supreme Court. The President is given, not the power to *appoint* public officers of the United States, but only the right to *nominate* them, and a provision is inserted by virtue of which Congress may require Senate confirmation of his nominees.

It would seem a fair surmise that a compromise had been made. But no change was made in the concept of the term "Officers of the United States," which since it had first appeared in Art. X had been taken by all concerned to embrace all appointed officials exercising responsibility under the public laws of the Nation.

Appellee Commission and *amici* urge that because of what they conceive to be the extraordinary authority reposed in Congress to regulate elections, this case stands on a different footing than if Congress had exercised its legislative authority in another field. There is, of course, no doubt that Congress has express authority to regulate

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[172] *Id.*, at 571–573.

[173] *Id.*, at 575.

congressional elections, by virtue of the power conferred in Art. I, § 4.[174] This Court has also held that it has very broad authority to prevent corruption in national Presidential elections. *Burroughs* v. *United States*, 290 U. S. 534 (1934). But Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction. We see no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers.

The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. Unless their selection is elsewhere provided for, *all* officers of the United States are to be appointed in accordance with the Clause. Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary. No class or type of officer is excluded because of its special functions. The President appoints judicial as well as executive officers. Neither has it been disputed—and apparently

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[174] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

it is not now disputed—that the Clause controls the appointment of the members of a typical administrative agency even though its functions, as this Court recognized in *Humphrey's Executor* v. *United States*, 295 U. S. 602, 624 (1935), may be "predominantly quasi-judicial and quasi-legislative" rather than executive. The Court in that case carefully emphasized that although the members of such agencies were to be independent of the Executive in their day-to-day operations, the Executive was not excluded from selecting them. *Id.*, at 625–626.

Appellees argue that the legislative authority conferred upon the Congress in Art. I, § 4, to regulate "the Times, Places and Manner of holding Elections for Senators and Representatives" is augmented by the provision in § 5 that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." Section 5 confers, however, not a general legislative power upon the Congress, but rather a power "judicial in character" upon each House of the Congress. *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613 (1929). The power of each House to judge whether one claiming election as Senator or Representative has met the requisite qualifications, *Powell* v. *McCormack*, 395 U. S. 486 (1969), cannot reasonably be translated into a power granted to the Congress itself to impose substantive qualifications on the right to so hold such office. Whatever power Congress may have to legislate, such qualifications must derive from § 4, rather than § 5, of Art. I.

Appellees also rely on the Twelfth Amendment to the Constitution insofar as the authority of the Commission to regulate practices in connection with the Presidential election is concerned. This Amendment provides that certificates of the votes of the electors be "sealed [and]

directed to the President of the Senate," and that the "President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." The method by which Congress resolved the celebrated disputed Hayes-Tilden election of 1876, reflected in 19 Stat. 227, supports the conclusion that Congress viewed this Amendment as conferring upon its two Houses the same sort of power "judicial in character," *Barry* v. *United States ex rel. Cunningham, supra,* at 613, as was conferred upon each House by Art. I, § 5, with respect to elections of its own members.

We are also told by appellees and *amici* that Congress had good reason for not vesting in a Commission composed wholly of Presidential appointees the authority to administer the Act, since the administration of the Act would undoubtedly have a bearing on any incumbent President's campaign for re-election. While one cannot dispute the basis for this sentiment as a practical matter, it would seem that those who sought to challenge incumbent Congressmen might have equally good reason to fear a Commission which was unduly responsive to members of Congress whom they were seeking to unseat. But such fears, however rational, do not by themselves warrant a distortion of the Framers' work.

Appellee Commission and *amici* finally contend, and the majority of the Court of Appeals agreed with them, that whatever shortcomings the provisions for the appointment of members of the Commission might have under Art. II, Congress had ample authority under the Necessary and Proper Clause of Art. I to effectuate this result. We do not agree. The proper inquiry when considering the Necessary and Proper Clause is not the authority of Congress to create an office or a commission, which is broad indeed, but rather its authority to pro-

vide that its own officers may make appointments to such office or commission.

So framed, the claim that Congress may provide for this manner of appointment under the Necessary and Proper Clause of Art. I stands on no better footing than the claim that it may provide for such manner of appointment because of its substantive authority to regulate federal elections. Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in § 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

The trilogy of cases from this Court dealing with the constitutional authority of Congress to circumscribe the President's power to *remove* officers of the United States is entirely consistent with this conclusion. In *Myers* v. *United States*, 272 U. S. 52 (1926), the Court held that Congress could not by statute divest the President of the power to remove an officer in the Executive Branch whom he was initially authorized to appoint. In explaining its reasoning in that case, the Court said:

> "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were

to act for him under his direction in the execution of the laws.

. . . . . .

"Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, i. e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . . ." *Id.*, at 117, 163–164.

In the later case of *Humphrey's Executor*, where it was held that Congress could circumscribe the President's power to remove members of independent regulatory agencies, the Court was careful to note that it was dealing with an agency intended to be independent of executive authority *"except in its selection."* 295 U. S., at 625 (emphasis in original). *Wiener* v. *United States*, 357 U. S. 349 (1958), which applied the holding in *Humphrey's Executor* to a member of the War Claims Commission, did not question in any respect that members of independent agencies are not independent of the Executive with respect to their appointments.

This conclusion is buttressed by the fact that Mr. Justice Sutherland, the author of the Court's opinion in *Humphrey's Executor*, likewise wrote the opinion for the Court in *Springer* v. *Philippine Islands*, 277 U. S. 189 (1928), in which it was said:

"Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the case might be different if the additional duties

were devolved upon an appointee of the executive." *Id.*, at 202.

3. The Commission's Powers

Thus, on the assumption that all of the powers granted in the statute may be exercised by an agency whose members *have been* appointed in accordance with the Appointments Clause,[175] the ultimate question is which, if any, of those powers may be exercised by the present voting Commissioners, none of whom *was* appointed as provided by that Clause. Our previous description of the statutory provisions, see *supra*, at 109–113, disclosed that the Commission's powers fall generally into three categories: functions relating to the flow of necessary information—receipt, dissemination, and investigation; functions with respect to the Commission's task of fleshing out the statute—rulemaking and advisory opinions; and functions necessary to ensure compliance with the statute and rules—informal procedures, administrative determinations and hearings, and civil suits.

Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them. *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881); *McGrain* v. *Daugherty*,

[175] Since in future legislation that may be enacted in response to today's decision Congress might choose not to confer one or more of the powers under discussion to a properly appointed agency, our assumption is *arguendo* only. Considerations of ripeness prevent us from deciding, for example, whether such an agency could under § 456 disqualify a candidate for federal election consistently with Art. I, § 5, cl. 1. With respect to this and other powers discussed *infra*, this page and 138–141, we need pass only upon their nature in relation to the Appointments Clause, and not upon their validity *vel non*.

273 U. S. 135 (1927); *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491 (1975). As this Court stated in *McGrain*, *supra*, at 175:

> "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it."

But when we go beyond this type of authority to the more substantial powers exercised by the Commission, we reach a different result. The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3.

Congress may undoubtedly under the Necessary and Proper Clause create "offices" in the generic sense and provide such method of appointment to those "offices" as it chooses. But Congress' power under that Clause

is inevitably bounded by the express language of Art. II, § 2, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be "Officers of the United States." They may, therefore, properly perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not "Officers of the United States."

This Court observed more than a century ago with respect to litigation conducted in the courts of the United States:

> "Whether tested, therefore, by the requirements of the Judiciary Act, or by the usage of the government, or by the decisions of this court, it is clear that all such suits, so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General." *Confiscation Cases,* 7 Wall. 454, 458–459 (1869).

The Court echoed similar sentiments 59 years later in *Springer* v. *Philippine Islands,* 277 U. S., at 202, saying:

> "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this Court. *Myers* v. *United States,* 272 U. S. 52.
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> "Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the

> case might be different if the additional duties were devolved upon an appointee of the executive."

We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, § 2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section.

All aspects of the Act are brought within the Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. These functions, exercised free from day-to-day supervision of either Congress [176] or the Executive Branch, are more legislative and judicial in nature than are the Commis-

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[176] Before a rule or regulation promulgated by the Commission under § 438 (a)(10) may go into effect, it must be transmitted either to the Senate or House of Representatives together with "a detailed explanation and justification of such rule or regulation." § 438 (c)(1). If the House of Congress to which the rule is required to be transmitted disapproves the proposed regulation within the specified period of time, it may not be promulgated by the Commission. Appellants make a separate attack on this qualification of the Commission's rulemaking authority, which is but the most recent episode in a long tug of war between the Executive and Legislative Branches of the Federal Government respecting the permissible extent of legislative involvement in rulemaking under statutes which have already been enacted. The history of these episodes is described in Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569 (1953); in Newman & Keaton, Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?, 41 Calif. L. Rev. 565 (1953); and in Watson, *supra*, n. 166. Because of our holding that the manner of appointment of the members of the Commission precludes them from exercising the rulemaking powers in question, we have no occasion to address this separate challenge of appellants.

sion's enforcement powers, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. Congress viewed these broad powers as essential to effective and impartial administration of the entire substantive framework of the Act. Yet each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. While the President may not insist that such functions be delegated to an appointee of his removable at will, *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law to allow it to be performed by the present Commission. These administrative functions may therefore be exercised only by persons who are "Officers of the United States." [177]

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[177] The subsidiary questions certified by the District Court relating to the composition of the Federal Election Commission, together with our answers thereto, are as follows:

Question 8 (a). Does 2 U. S. C. § 437c (a) (1970 ed., Supp. IV) violate [the rights of one or more of the plaintiffs under the constitutional separation of powers, the First, Fourth, Fifth, Sixth, or Ninth Amendment, Art. I, § 2, cl. 6, Art. I, § 5, cl. 1, or Art. III] by the method of appointment of the Federal Election Commission?

With respect to the powers referred to in Questions 8 (b)–8 (f), the method of appointment violates Art. II, § 2, cl. 2, of the Constitution.

Question 8 (b). Do 2 U. S. C. §§ 437d and 437g (1970 ed., Supp. IV) violate such rights, in that they entrust administration and enforcement of the FECA to the Federal Election Commission?

Question 8 (c). Does 2 U. S. C. § 437g (a) (1970 ed., Supp. IV) violate such rights, in that it empowers the Federal Election Commission and the Attorney General to bring civil action (including proceedings for injunctions) against any person who has engaged or

It is also our view that the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date, including its administration of those provisions, upheld today, authorizing the public financing of federal elections. The past acts of the Commission are therefore accorded *de facto* validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan. *Connor* v. *Williams*, 404 U. S. 549, 550–551 (1972). See *Ryan* v. *Tinsley*, 316 F. 2d 430, 431–432 (CA10 1963); *Schaefer* v. *Thomson*, 251 F. Supp. 450, 453 (Wyo. 1965), aff'd *sub nom. Harrison* v. *Schaeffer*, 383 U. S. 269 (1966). Cf. *City of Richmond* v. *United States*, 422 U. S. 358, 379 (1975) (BRENNAN, J., dissenting). We also draw on the Court's practice in

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who may engage in acts or practices which violate the Federal Election Campaign Act, *as amended*, or §§ 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18 (1970 ed., Supp. IV)?

Question 8 (d). Does 2 U. S. C. § 438 (c) (1970 ed., Supp. IV) violate such rights in that it empowers the Federal Election Commission to make rules under the FECA in the manner specified therein?

Question 8 (e). Does 2 U. S. C. § 456 (1970 ed., Supp. IV) violate such rights, in that it imposes a temporary disqualification on any candidate for election to federal office who is found by the Federal Election Commission to have failed to file a report required by Title III of the Federal Election Campaign Act, *as amended?*

Question 8 (f). Does § 9008 of the Internal Revenue Code of 1954 violate such rights, in that it empowers the Federal Election Commission to authorize expenditures of the national committee of a party with respect to Presidential nominating conventions in excess of the limits enumerated therein?

The Federal Election Commission as presently constituted may not under Art. II, § 2, cl. 2, of the Constitution exercise the powers referred to in Questions 8 (b)–8 (f).

the apportionment and voting rights cases and stay, for a period not to exceed 30 days, the Court's judgment insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act. This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function *de facto* in accordance with the substantive provisions of the Act. Cf. *Georgia* v. *United States,* 411 U. S. 526, 541 (1973); *Fortson* v. *Morris,* 385 U. S. 231, 235 (1966); *Maryland Comm.* v. *Tawes,* 377 U. S. 656, 675–676 (1964).

CONCLUSION

In summary,[178] we sustain the individual contribution limits, the disclosure and reporting provisions, and the public financing scheme. We conclude, however, that the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm. Finally, we hold that most of the powers conferred by the Act upon the Federal Election Commission can be exercised only by "Officers of the United States," appointed in conformity with Art. II, § 2, cl. 2, of the Constitution, and therefore cannot be exercised by the Commission as presently constituted.

In No. 75–436, the judgment of the Court of Appeals

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[178] We have not set forth specific answers to some of the certified questions. Question 9, dealing with alleged vagueness in several provisions, 171 U. S. App. D. C., at 252, 519 F. 2d, at 901 (Appendix A), is resolved in the opinion to the extent urged by the parties. We need not respond to questions 3 (g), 3 (i), 4 (b), and 7 (f), *id.*, at 250–251, 519 F. 2d, at 899–900 (Appendix A), to resolve the issues presented.

is affirmed in part and reversed in part. The judgment of the District Court in No. 75–437 is affirmed. The mandate shall issue forthwith, except that our judgment is stayed, for a period not to exceed 30 days, insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

APPENDIX TO PER CURIAM OPINION*

TITLE 2. THE CONGRESS

CHAPTER 14—FEDERAL ELECTION CAMPAIGNS

SUBCHAPTER I.—DISCLOSURE OF FEDERAL CAMPAIGN FUNDS

§ 431. Definitions.

When used in this subchapter and subchapter II of this chapter—

(a) "election" means—

(1) a general, special, primary, or runoff election;

(2) a convention or caucus of a political party held to nominate a candidate;

(3) a primary election held for the selection of delegates to a national nominating convention of a political party; and

(4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President;

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*Based upon Federal Election Campaign Laws, compiled by the Senate Library for the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration (1975).

(b) "candidate" means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, if he has—

(1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, to Federal office; or

(2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

(c) "Federal office" means the office of President or Vice President of the United States; or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

(d) "political committee" means any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

(e) "contribution"—

(1) means a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of—

(A) influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party; or

(B) influencing the result of an election held for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a contract, promise, or agreement, expressed or implied, whether or not legally enforceable, to make a contribution for such purposes;

(3) means funds received by a political committee which are transferred to such committee from another political committee or other source;

(4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose; but

(5) does not include—

(A) the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee;

(B) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities;

(C) the sale of any food or beverage by a vendor for use in a candidate's campaign at a charge less than the normal comparable charge, if such charge for use in a candidate's campaign is at least equal to the cost of such food or beverage to the vendor;

(D) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate;

(E) the payment by a State or local committee of a political party of the costs of prepa-

ration, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or other similar types of general public political advertising; or

(F) any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of the last paragraph of section 610 of Title 18, would not constitute an expenditure by such corporation or labor organization;

to the extent that the cumulative value of activities by any individual on behalf of any candidate under each of clauses (B), (C), and (D) does not exceed $500 with respect to any election;

(f) "expenditure"—

(1) means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of—

(A) influencing the nomination for election, or the election, of any person to Federal office, or to the office of presidential and vice presidential elector; or

(B) influencing the results of a primary election held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for

the nomination of persons for election to the office of President of the United States;

(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure;

(3) means the transfer of funds by a political committee to another political committee; but

(4) does not include—

(A) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(B) nonpartisan activity designed to encourage individuals to register to vote or to vote;

(C) any communication by any membership organization or corporation to its members or stockholders, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any person to Federal office;

(D) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities if the cumulative value of such activities by such individual on behalf of any candidate do [*sic*] not exceed $500 with respect to any election;

(E) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate if the cumulative amount for such individual incurred with respect to such candi-

date does not exceed $500 with respect to any election;

(F) any communication by any person which is not made for the purpose of influencing the nomination for election, or election, of any person to Federal office; or

(G) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines or other similar types of general public political advertising; or

(H) any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of the last paragraph of section 610 of Title 18, would not constitute an expenditure by such corporation or labor organization;

(g) "Commission" means the Federal Election Commission;

(h) "person" means an individual, partnership, committee, association, corporation, labor organization, and any other organization or group of persons;

(i) "State" means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(j) "identification" means—

(1) in the case of an individual, his full name and the full address of his principal place of residence; and

(2) in the case of any other person, the full name and address of such person;

(k) "national committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission;

(l) "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission;

(m) "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office, whose name appears on the election ballot as the candidate of such association, committee, or organization; and

(n) "principal campaign committee" means the principal campaign committee designated by a candidate under section 432 (f)(1) of this title.

§ 432. Organization of political committees.

(a) *Chairman; treasurer; vacancies; official authorizations.* Every political committee shall have a chairman and a treasurer. No contribution and no expenditure shall be accepted or made by or on behalf of a political committee at a time when there is a vacancy in the office of chairman or treasurer thereof. No expenditure shall be made for or on behalf of a political committee without the authorization of its chairman or treasurer, or their designated agents.

(b) *Account of contributions; segregated funds.*

Every person who receives a contribution in excess of $10 for a political committee shall, on demand of the treasurer, and in any event within 5 days after receipt of such contribution, render to the treasurer a detailed account thereof, including the amount of the contribution and the identification of the person making such contribution, and the date on which received. All funds of a political committee shall be segregated from, and may not be commingled with, any personal funds of officers, members, or associates of such committee.

(c) *Recordkeeping.* It shall be the duty of the treasurer of a political committee to keep a detailed and exact account of—

(1) all contributions made to or for such committee;

(2) the identification of every person making a contribution in excess of $10, and the date and amount thereof and, if a person's contributions aggregate more than $100, the account shall include occupation, and the principal place of business (if any);

(3) all expenditures made by or on behalf of such committee; and

(4) the identification of every person to whom any expenditure is made, the date and amount thereof and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made.

(d) *Receipts; preservation.* It shall be the duty of the treasurer to obtain and keep a receipted bill, stating the particulars, for every expenditure made by or on behalf of a political committee in excess of $100 in amount, and for any such expenditure in a lesser amount, if the aggregate amount of such expenditures to the same person during a calendar year exceeds $100. The treas-

urer shall preserve all receipted bills and accounts required to be kept by this section for periods of time to be determined by the Commission.

(e) *Unauthorized activities; notice.* Any political committee which solicits or receives contributions or makes expenditures on behalf of any candidate that is not authorized in writing by such candidate to do so shall include a notice on the face or front page of all literature and advertisements published in connection with such candidate's campaign by such committee or on its behalf stating that the committee is not authorized by such candidate and that such candidate is not responsible for the activities of such committee.

(f) *Principal campaign committees; one candidate limitation; office of President: national committee for candidate; duties.* (1) Each individual who is a candidate for Federal office (other than the office of Vice President of the United States) shall designate a political committee to serve as his principal campaign committee. No political committee may be designated as the principal campaign committee of more than one candidate, except that the candidate for the office of President of the United States nominated by a political party may designate the national committee of such political party as his principal campaign committee. Except as provided in the preceding sentence, no political committee which supports more than one candidate may be designated as a principal campaign committee.

(2) Notwithstanding any other provision of this subchapter, each report or statement of contributions received or expenditures made by a political committee (other than a principal campaign committee) which is required to be filed with the Commission under this subchapter shall be filed instead with the principal campaign

committee for the candidate on whose behalf such contributions are accepted or such expenditures are made.

(3) It shall be the duty of each principal campaign committee to receive all reports and statements required to be filed with it under paragraph (2) of this subsection and to compile and file such reports and statements, together with its own reports and statements, with the Commission in accordance with the provisions of this subchapter.

§ 433. Registration of political committees.

(a) *Statements of organization.* Each political committee which anticipates receiving contributions or making expenditures during the calendar year in an aggregate amount exceeding $1,000 shall file with the Commission a statement of organization, within 10 days after its organization or, if later, 10 days after the date on which it has information which causes the committee to anticipate it will receive contributions or make expenditures in excess of $1,000. Each such committee in existence at the date of enactment of this Act shall file a statement of organization with the Commission at such time as it prescribes.

(b) *Contents of statements.* The statement of organization shall include—

(1) the name and address of the committee;

(2) the names, addresses, and relationships of affiliated or connected organizations;

(3) the area, scope, or jurisdiction of the committee;

(4) the name, address, and position of the custodian of books and accounts;

(5) the name, address, and position of other principal officers, including officers and members of the finance committee, if any;

(6) the name, address, office sought, and party affiliation of—

(A) each candidate whom the committee is supporting; and

(B) any other individual, if any, whom the committee is supporting for nomination for election, or election, to any public office whatever; or, if the committee is supporting the entire ticket of any party, the name of the party;

(7) a statement whether the committee is a continuing one;

(8) the disposition of residual funds which will be made in the event of dissolution;

(9) a listing of all banks, safety deposit boxes, or other repositories used;

(10) a statement of the reports required to be filed by the committee with State or local officers, and, if so, the names, addresses, and positions of such persons; and

(11) such other information as shall be required by the Commission.

(c) *Information changes; report.* Any change in information previously submitted in a statement of organization shall be reported to the Commission within a 10-day period following the change.

(d) *Disbanding of political committees or contributions and expenditures below prescribed ceiling; notice.* Any committee which, after having filed one or more statements of organization, disbands or determines it will no longer receive contributions or make expenditures during the calendar year in an aggregate amount exceeding $1,000 shall so notify the Commission.

(e) *Filing reports and notifications with appropriate principal campaign committees.* In the case of a political

committee which is not a principal campaign committee, reports and notifications required under this section to be filed with the Commission shall be filed instead with the appropriate principal campaign committee.

§ 434. Reports by political committees and candidates.

(a) *Receipts and expenditures; completion date, exception.*

(1) Except as provided by paragraph (2), each treasurer of a political committee supporting a candidate or candidates for election to Federal office, and each candidate for election to such office, shall file with the Commission reports of receipts and expenditures on forms to be prescribed or approved by it. The reports referred to in the preceding sentence shall be filed as follows:

(A)(i) In any calendar year in which an individual is a candidate for Federal office and an election for such Federal office is held in such year, such reports shall be filed not later than the 10th day before the date on which such election is held and shall be complete as of the 15th day before the date of such election; except that any such report filed by registered or certified mail must be postmarked not later than the close of the 12th day before the date of such election.

(ii) such reports shall be filed not later than the 30th day after the day of such election and shall be complete as of the 20th day after the date of such election.

(B) In any other calendar year in which an individual is a candidate for Federal office, such reports shall be filed after December 31 of such calendar year, but not later than January 31 of the following calendar year and shall be complete as of the close of the calendar year with respect to which the report is filed.

(C) Such reports shall be filed not later than the 10th day following the close of any calendar quarter in which the candidate or political committee concerned received contributions in excess of $1,000, or made expenditures in excess of $1,000, and shall be complete as of the close of such calendar quarter; except that any such report required to be filed after December 31 of any calendar year with respect to which a report is required to be filed under subparagraph (B) shall be filed as provided in such subparagraph.

(D) When the last day for filing any quarterly report required by subparagraph (C) occurs within 10 days of an election, the filing of such quarterly report shall be waived and superseded by the report required by subparagraph (A)(i).

Any contribution of $1,000 or more received after the 15th day, but more than 48 hours, before any election shall be reported within 48 hours after its receipt.

(2) Each treasurer of a political committee which is not a principal campaign committee shall file the reports required under this section with the appropriate principal campaign committee.

(3) Upon a request made by a presidential candidate or a political committee which operates in more than one State, or upon its own motion, the Commission may waive the reporting dates set forth in paragraph (1) (other than the reporting date set forth in paragraph (1)(B)), and require instead that such candidate or political committee file reports not less frequently than monthly. The Commission may not require a presidential candidate or a political committee operating in more than one State to file more than 12 reports (not counting any report referred to in paragraph (1)(B)) during any calendar year. If the Commission acts on its own motion

under this paragraph with respect to a candidate or a political committee, such candidate or committee may obtain judicial review in accordance with the provisions of chapter 7 of Title 5.

(b) *Contents of reports.* Each report under this section shall disclose—

(1) the amount of cash on hand at the beginning of the reporting period;

(2) the full name and mailing address (occupation and the principal place of business, if any) of each person who has made one or more contributions to or for such committee or candidate (including the purchase of tickets for events such as dinners, luncheons, rallies, and similar fundraising events) within the calendar year in an aggregate amount or value in excess of $100, together with the amount and date of such contributions;

(3) the total sum of individual contributions made to or for such committee or candidate during the reporting period and not reported under paragraph (2);

(4) the name and address of each political committee or candidate from which the reporting committee or the candidate received, or to which that committee or candidate made, any transfer of funds, together with the amounts and dates of all transfers;

(5) each loan to or from any person within the calendar year in an aggregate amount or value in excess of $100, together with the full names and mailing addresses (occupations and the principal places of business, if any) of the lender, endorsers, and guarantors, if any, and the date and amount of such loans;

(6) the total amount of proceeds from—

(A) the sale of tickets to each dinner, luncheon, rally, and other fundraising event;

(B) mass collections made at such events; and

(C) sales of items such as political campaign pins, buttons, badges, flags, emblems, hats, banners, literature, and similar materials;

(7) each contribution, rebate, refund, or other receipt in excess of $100 not otherwise listed under paragraphs (2) through (6);

(8) the total sum of all receipts by or for such committee or candidate during the reporting period, together with total expenditures less transfers between political committees which support the same candidate and which do not support more than one candidate;

(9) the identification of each person to whom expenditures have been made by such committee or on behalf of such committee or candidate within the calendar year in an aggregate amount or value in excess of $100, the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made;

(10) the identification of each person to whom an expenditure for personal services, salaries, and reimbursed expenses in excess of $100 has been made, and which is not otherwise reported, including the amount, date, and purpose of such expenditure;

(11) the total sum of expenditures made by such committee or candidate during the calendar year, together with total receipts less transfers between political committees which support the same candidate and which do not support more than one candidate;

(12) the amount and nature of debts and obligations owed by or to the committee, in such form as the supervisory officer may prescribe and a continuous reporting of their debts and obligations after the election at such periods as the Commission may require until such debts and obligations are extinguished, together with a statement as to the circumstances and conditions under which any such debt or obligation is extinguished and the consideration therefor; and

(13) such other information as shall be required by the Commission.

(c) *Cumulative reports for calendar year; amounts for unchanged items carried forward; statement of inactive status.* The reports required to be filed by subsection (a) of this section shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward. If no contributions or expenditures have been accepted or expended during a calendar year, the treasurer of the political committee or candidate shall file a statement to that effect.

(d) *Members of Congress; reporting exemption.* This section does not require a Member of the Congress to report, as contributions received or as expenditures made, the value of photographic, matting, or recording services furnished to him by the Senate Recording Studio, the House Recording Studio, or by an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives and who furnishes such services as his primary duty as an employee of the Senate or House of Representatives, or if such services were paid for by the Republican or Democratic Senatorial Campaign Committee, the Democratic National Congressional

Committee, or the National Republican Congressional Committee. This subsection does not apply to such recording services furnished during the calendar year before the year in which the Member's term expires.

(e) *Reports by other than political committees.* Every person (other than a political committee or candidate) who makes contributions or expenditures, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 within a calendar year shall file with the Commission a statement containing the information required by this section. Statements required by this subsection shall be filed on the dates on which reports by political committees are filed but need not be cumulative.

§ 437a. Reports by certain persons; exemptions.

Any person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate shall file reports with the Commission as if such person were a political committee. The reports filed by such person shall set forth the source of the funds used in carrying out any activity described in the preceding sentence in the same detail as if the funds were contributions within the meaning of section 431 (e) of this title, and payments of such funds in the same detail as if they were expenditures within the meaning of section 431 (f) of this title. The pro-

visions of this section do not apply to any publication or broadcast of the United States Government or to any news story, commentary, or editorial distributed through the facilities of a broadcasting station or a bona fide newspaper, magazine, or other periodical publication. A news story, commentary, or editorial is not considered to be distributed through a bona fide newspaper, magazine, or other periodical publication if—

(1) such publication is primarily for distribution to individuals affiliated by membership or stock ownership with the person (other than an individual) distributing it or causing it to be distributed, and not primarily for purchase by the public at newsstands or paid by subscription; or

(2) the news story, commentary, or editorial is distributed by a person (other than an individual) who devotes a substantial part of his activities to attempting to influence the outcome of elections, or to influence public opinion with respect to matters of national or State policy or concern.

§ 437c. Federal Election Commission.

(a) *Establishment; membership; term of office; vacancies; qualifications; compensation; chairman and vice chairman.*

(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without the right to vote, and six members appointed as follows:

(A) two shall be appointed, with the confirmation of a majority of both Houses of the Congress, by the President pro tempore of the Senate upon the recommendations of the majority leader of the Senate and the minority leader of the Senate;

(B) two shall be appointed, with the confirmation of a majority of both Houses of the Congress, by the Speaker of the House of Representatives, upon the recommendations of the majority leader of the House and the minority leader of the House; and

(C) two shall be appointed, with the confirmation of a majority of both Houses of the Congress, by the President of the United States.

A member appointed under subparagraph (A), (B), or (C) shall not be affiliated with the same political party as the other member appointed under such paragraph.

(2) Members of the Commission shall serve for terms of 6 years, except that of the members first appointed—

(A) one of the members appointed under paragraph (1)(A) shall be appointed for a term ending on the April 30 first occurring more than 6 months after the date on which he is appointed;

(B) one of the members appointed under paragraph (1)(B) shall be appointed for a term ending 1 year after the April 30 on which the term of the member referred to in subparagraph (A) of this paragraph ends;

(C) one of the members appointed under paragraph (1)(C) shall be appointed for a term ending 2 years thereafter;

(D) one of the members appointed under paragraph (1)(A) shall be appointed for a term ending 3 years thereafter;

(E) one of the members appointed under paragraph (1)(B) shall be appointed for a term ending 4 years thereafter; and

(F) one of the members appointed under para-

graph (1)(C) shall be appointed for a term ending 5 years thereafter.

An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he succeeds. Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their maturity, experience, integrity, impartiality, and good judgment and shall be chosen from among individuals who, at the time of their appointment, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Government of the United States.

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall receive compensation equivalent to the compensation paid at level IV of the Executive Schedule (5 U. S. C. 5315).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. No member may serve as chairman more often than once during any term of office to which he is appointed. The chairman and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman, or in the event of a vacancy in such office.

(b) *Administration, enforcement, and formulation of policy; primary jurisdiction of civil enforcement.*

The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to this Act and sections 608, 610, 611, 613, 614, 615, 616,

and 617 of Title 18. The Commission has primary jurisdiction with respect to the civil enforcement of such provisions.

(c) *Voting requirement; nondelegation of function.*

All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this subchapter shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his vote or any decisionmaking authority or duty vested in the Commission by the provisions of this subchapter.

(d) *Meetings.*

The Commission shall meet at least once each month and also at the call of any member.

(e) *Rules for conduct of activities; seal, judicial notice; principal office.*

The Commission shall prepare written rules for the conduct of its activities, shall have an official seal which shall be judicially noticed, and shall have its principal office in or near the District of Columbia (but it may meet or exercise any of its powers anywhere in the United States).

(f) *Staff director and general counsel: appointment and compensation; appointment and compensation of personnel and procurement of intermittent services by staff director; use of assistance, personnel, and facilities of Federal agencies and departments.*

(1) The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the Executive Schedule (5 U. S. C. 5315). The general counsel shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U. S. C. 5316). With the approval of the

Commission, the staff director may appoint and fix the pay of such additional personnel as he considers desirable.

(2) With the approval of the Commission, the staff director may procure temporary and intermittent services to the same extent as is authorized by section 3109 (b) of Title 5, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS–15 of the general schedule (5 U. S. C. 5332).

(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities, of other agencies and departments of the United States Government. The heads of such agencies and departments may make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

§ 437d. Powers of Commission.

(a) *Specific enumeration.*

The Commission has the power—

(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission shall be made within such a reasonable period of time and under oath or otherwise as the Commission may determine;

(2) to administer oaths or affirmations;

(3) to require by subpena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has

the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3) of this subsection;

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil proceedings for injunctive, declaratory, or other appropriate relief), defend, or appeal any civil action in the name of the Commission for the purpose of enforcing the provisions of this Act, through its general counsel;

(7) to render advisory opinions under section 437 of this title;

(8) to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, as are necessary to carry out the provisions of this Act;

(9) to formulate general policy with respect to the administration of this Act and sections 608, 610, 611, 613, 614, 615, 616, and 617 of Title 18;

(10) to develop prescribed forms under subsection (a)(1) of this section; and

(11) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

(b) *Judicial orders for compliance with subpenas and orders of Commission; contempt of court.*

Any United States district court within the jurisdiction of which any inquiry is carried on, may, upon petition by the Commission, in case of refusal to obey a subpena or order of the Commission issued under subsection (a) of this section, issue an order requiring compliance therewith. Any failure to obey the order of the

court may be punished by the court as a contempt thereof.

(c) *Civil liability for disclosure of information.*

No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(d) *Transmittal to Congress: Budget estimates or requests and legislative recommendations; prior transmittal to Congress: legislative recommendations.*

(1) Whenever the Commission submits any budget estimate or request to the President of the United States or the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation, requested by the Congress or by any Member of the Congress, to the President of the United States or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress or to the Member requesting the same. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation, to any office or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

§ 437e. Reports to President and Congress.

The Commission shall transmit reports to the President of the United States and to each House of the Congress no later than March 31 of each year. Each such report shall contain a detailed statement with respect to the activities of the Commission in carrying out its duties under this subchapter, together with recommendations

for such legislative or other action as the Commission considers appropriate.

§ 437f. Advisory opinions.

(a) *Written requests; written opinions within reasonable time; specific transactions or activities constituting violations of provisions.*

Upon written request to the Commission by any individual holding Federal office, any candidate for Federal office, or any political committee, the Commission shall render an advisory opinion, in writing, within a reasonable time with respect to whether any specific transaction or activity by such individual, candidate, or political committee would constitute a violation of this Act, of chapter 95 or chapter 96 of Title 26 or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18.

(b) *Presumption of compliance with provisions based on good faith actions.*

Notwithstanding any other provision of law, any person with respect to whom an advisory opinion is rendered under subsection (a) of this section who acts in good faith in accordance with the provisions and findings of such advisory opinion shall be presumed to be in compliance with the provision of this Act, of chapter 95 or chapter 96 of Title 26, or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18, with respect to which such advisory opinion is rendered.

(c) *Requests made public; transmittal to Commission of comments of interested parties with respect to such requests.*

Any request made under subsection (a) shall be made public by the Commission. The Commission shall before rendering an advisory opinion with respect to such request, provide any interested party with an opportunity to transmit written comments to the Commission with respect to such request.

§ 437g. Enforcement.

(a) *Violations; complaints and referrals; notification and investigation by Commission: venue, judicial orders; referral to law enforcement authorities: civil actions by Attorney General: venue, judicial orders, bond; subpenas; review by courts of appeals: time for petition, finality of judgment; review by Supreme Court; docket: advancement and priorities.*

(1)(A) Any person who believes a violation of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18 has occurred may file a complaint with the Commission.

(B) In any case in which the Clerk of the House of Representatives or the Secretary of the Senate (who receive reports and statements as custodian for the Commission) has reason to believe a violation of this act or section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18 has occurred he shall refer such apparent violation to the Commission.

(2) The Commission upon receiving any complaint under paragraph (1)(A), or a referral under paragraph (1)(B), or if it has reason to believe that any person has committed a violation of any such provision, shall notify the person involved of such apparent violation and shall—

(A) report such apparent violation to the Attorney General; or

(B) make an investigation of such apparent violation.

(3) Any investigation under paragraph (2)(B) shall be conducted expeditiously and shall include an investigation of reports and statements filed by any complainant under this subchapter, if such complainant is a candidate. Any notification or investigation made under paragraph (2) shall not be made public by the Commission or by

any other person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(4) The Commission shall, at the request of any person who receives notice of an apparent violation under paragraph (2), conduct a hearing with respect to such apparent violation.

(5) If the Commission determines, after investigation, that there is reason to believe that any person has engaged, or is about to engage in any acts or practices which constitute or will constitute a violation of this Act, it may endeavor to correct such violation by informal methods of conference, conciliation, and persuasion. If the Commission fails to correct the violation through informal methods, it may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business. Upon a proper showing that such person has engaged or is about to engage in such acts or practices, the court shall grant a permanent or temporary injunction, restraining order, or other order.

(6) The Commission shall refer apparent violations to the appropriate law enforcement authorities to the extent that violations of provisions of chapter 29 of Title 18 are involved, or if the Commission is unable to correct apparent violations of this Act under the authority given it by paragraph (5), or if the Commission determines that any such referral is appropriate.

(7) Whenever in the judgment of the Commission, after affording due notice and an opportunity for a hearing, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18,

upon request by the Commission the Attorney General on behalf of the United States shall institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person is found, resides, or transacts business. Upon a proper showing that such person has engaged or is about to engage in such acts or practices, a permanent or temporary injunction, restraining order, or other order shall be granted without bond by such court.

(8) In any action brought under paragraph (5) or (7) of this subsection, subpenas for witnesses who are required to attend a United States district court may run into any other district.

(9) Any party aggrieved by an order granted under paragraph (5) or (7) of this subsection may, at any time within 60 days after the date of entry thereof, file a petition with the United States court of appeals for the circuit in which such order was issued for judicial review of such order.

(10) The judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(11) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(b) *Reports of Attorney General to Commission respecting action taken; reports of Commission respecting status of referrals.*

In any case in which the Commission refers an apparent violation to the Attorney General, the Attorney

General shall respond by report to the Commission with respect to any action taken by the Attorney General regarding such apparent violation. Each report shall be transmitted no later than 60 days after the date the Commission refers any apparent violation, and at the close of every 30-day period thereafter until there is final disposition of such apparent violation. The Commission may from time to time prepare and publish reports on the status of such referrals.

§ 437h. Judicial review.

(a) *Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc.*

The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18. The district court immediately shall certify all questions of constitutionality of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18, to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) *Appeal to Supreme Court; time for appeal.*

Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) *Advancement on appellate docket and expedited deposition of certified questions.*

It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

§ 438. Administrative and judicial provisions.

(a) *Federal Election Commission; duties.*

It shall be the duty of the Commission—

(1) *Forms.* To develop and furnish to the person required by the provisions of this Act prescribed forms for the making of the reports and statements required to be filed with it under this subchapter;

(2) *Manual for uniform bookkeeping and reporting methods.* To prepare, publish, and furnish to the person required to file such reports and statements a manual setting forth recommended uniform methods of bookkeeping and reporting;

(3) *Filing, coding, and cross-indexing system.* To develop a filing, coding, and cross-indexing system consonant with the purposes of this subchapter;

(4) *Public inspection; copies; sale or use restrictions.* To make the reports and statements filed with it available for public inspection and copying, commencing as soon as practicable but not later than the end of the second day following the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, as requested by any person, at the expense of such person: *Provided,* That any information copied from such reports and statements shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose;

(5) *Preservation of reports and statements.* To preserve such reports and statements for a period of

10 years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only 5 years from the date of receipt;

(6) *Index of reports and statements; publication in Federal Register.* To compile and maintain a cumulative index of reports and statements filed with it, which shall be published in the Federal Register at regular intervals and which shall be available for purchase directly or by mail for a reasonable price;

(7) *Special reports; publication.* To prepare and publish from time to time special reports listing those candidates for whom reports were filed as required by this subchapter and those candidates for whom such reports were not filed as so required;

(8) *Audits; investigations.* To make from time to time audits and field investigations with respect to reports and statements filed under the provisions of this subchapter, and with respect to alleged failures to file any report or statement required under the provisions of this subchapter;

(9) *Enforcement authorities; reports of violations.* To report apparent violations of law to the appropriate law enforcement authorities; and

(10) *Rules and regulations.* To prescribe suitable rules and regulations to carry out the provisions of this subchapter, in accordance with the provisions of subsection (c) of this section.

(b) *Commission; duties: national clearinghouse for information; studies, scope, publication, copies to general public at cost.* It shall be the duty of the Commission to serve as a national clearinghouse for information in respect to the administration of elections. In carrying out its duties under this subsection, the Commission shall enter into contracts for the purpose of conducting inde-

pendent studies of the administration of elections. Such studies shall include, but shall not be limited to, studies of—

(1) the method of selection of, and the type of duties assigned to, officials and personnel working on boards of elections;

(2) practices relating to the registration of voters; and

(3) voting and counting methods.

Studies made under this subsection shall be published by the Commission and copies thereof shall be made available to the general public upon the payment of the cost thereof.

(c) *Proposed rules or regulations; statement, transmittal to Congress; Presidential elections and Congressional elections; "legislative days" defined.*

(1) The Commission, before prescribing any rule or regulation under this section, shall transmit a statement with respect to such rule or regulation to the Senate or the House of Representatives, as the case may be, in accordance with the provisions of this subsection. Such statement shall set forth the proposed rule or regulation and shall contain a detailed explanation and justification of such rule or regulation.

(2) If the appropriate body of the Congress which receives a statement from the Commission under this subsection does not, through appropriate action, disapprove the proposed rule or regulation set forth in such statement no later than 30 legislative days after receipt of such statement, then the Commission may prescribe such rule or regulation. In the case of any rule or regulation proposed to deal with reports or statements required to be filed under this subchapter by a candidate for the office of Presi-

dent of the United States, and by political committees supporting such a candidate both the Senate and the House of Representatives shall have the power to disapprove such proposed rule or regulation. The Commission may not prescribe any rule or regulation which is disapproved under this paragraph.

(3) If the Commission proposes to prescribe any rule or regulation dealing with reports or statements required to be filed under this subchapter by a candidate for the office of Senator, and by political committees supporting such candidate, it shall transmit such statement to the Senate. If the Commission proposes to prescribe any rule or regulation dealing with reports or statements required to be filed under this subchapter by a candidate for the office of Representative, Delegate, or Resident Commissioner, and by political committees supporting such candidate, it shall transmit such statement to the House of Representatives. If the Commission proposes to prescribe any rule or regulation dealing with reports or statements required to be filed under this subchapter by a candidate for the office of President of the United States, and by political committees supporting such candidate it shall transmit such statement to the House of Representatives and the Senate.

(4) For purposes of this subsection, the term "legislative days" does not include, with respect to statements transmitted to the Senate, any calendar day on which the Senate is not in session, and with respect to statements transmitted to the House of Representatives, any calendar day on which the House of Representatives is not in session, and with respect to statements transmitted to both such bodies, any calendar day on which both Houses of the Congress are not in session.

(d) *Rules and regulations; issuance; custody of reports and statements; Congressional cooperation.*

(1) The Commission shall prescribe suitable rules and regulations to carry out the provisions of this subchapter, including such rules and regulations as may be necessary to require that—

(A) reports and statements required to be filed under this subchapter by a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, and by political committees supporting such candidate, shall be received by the Clerk of the House of Representatives as custodian for the Commission;

(B) reports and statements required to be filed under this subchapter by a candidate for the office of Senator, and by political committees supporting such candidate, shall be received by the Secretary of the Senate as custodian for the Commission; and

(C) the Clerk of the House of Representatives and the Secretary of the Senate, as custodians for the Commission, each shall make the reports and statements received by him available for public inspection and copying in accordance with paragraph (4) of subsection (a) of this section, and preserve such reports and statements in accordance with paragraph (5) of subsection (a) of this section.

(2) It shall be the duty of the Clerk of the House of Representatives and the Secretary of the Senate to cooperate with the Commission in carrying out its duties under this Act and to furnish such services and facilities as may be required in accordance with this section.

§ 439. Statements filed with State officers.

(a) *"Appropriate State" defined.* A copy of each statement required to be filed with the Commission by this subchapter shall be filed with the Secretary of State (or, if there is no office of Secretary of State, the equivalent State officer) of the appropriate State. For purposes of this subsection, the term "appropriate State" means—

(1) for reports relating to expenditures and contributions in connection with the campaign for nomination for election, or election, of a candidate to the office of President or Vice President of the United States, each State in which an expenditure is made by him or on his behalf, and

(2) for reports relating to expenditures and contributions in connection with the campaign for nomination for election, or election, of a candidate to the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, the State in which he seeks election.

(b) *Duties of State officers.* It shall be the duty of the Secretary of State, or the equivalent State officer, under subsection (a) of this section—

(1) to receive and maintain in an orderly manner all reports and statements required by this subchapter to be filed with him;

(2) to preserve such reports and statements for a period of 10 years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only 5 years from the date of receipt;

(3) to make the reports and statements filed with him available for public inspection and copying during regular office hours, commencing as soon

as practicable but not later than the end of the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, requested by any person, at the expense of such person; and

(4) to compile and maintain a current list of all statements or parts of statements pertaining to each candidate.

§ 439a. Use of contributed amounts for certain purposes; rules of Commission.

Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred by him in connection with his duties as a holder of Federal office, may be contributed by him to any organization described in section 170 (c) of Title 26, or may be used for any other lawful purpose. To the extent any such contribution, amount contributed, or expenditure thereof is not otherwise required to be disclosed under the provisions of this subchapter, such contribution, amount contributed, or expenditure shall be fully disclosed in accordance with rules promulgated by the Commission. The Commission is authorized to prescribe such rules as may be necessary to carry out the provisions of this section.

§ 441. Penalties for violations.

(a) Any person who violates any of the provisions of this subchapter shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

(b) In case of any conviction under this subchapter, where the punishment inflicted does not include imprisonment, such conviction shall be deemed a misdemeanor conviction only.

SUBCHAPTER II.—GENERAL PROVISIONS

§ 454. Partial invalidity.

If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby.

§ 456. Additional enforcement authority.

(a) *Findings, after notice and hearing, or failure to file timely reports; disqualification for prescribed period from candidacy in future Federal elections.*

In any case in which the Commission, after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5, makes a finding that a person who, while a candidate for Federal office, failed to file a report required by subchapter I of this chapter, and such finding is made before the expiration of the time within which the failure to file such report may be prosecuted as a violation of such subchapter I, such person shall be disqualified from becoming a candidate in any future election for Federal office for a period of time beginning on the date of such finding and ending one year after the expiration of the term of the Federal office for which such person was a candidate.

(b) *Judicial review of findings.*

Any finding by the Commission under subsection (a) of this section shall be subject to judicial review in accordance with the provisions of chapter 7 of Title 5.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

CHAPTER 29—ELECTIONS AND POLITICAL ACTIVITIES

§ 591. Definitions.

Except as otherwise specifically provided, when used in this section and in sections 597, 599, 600, 602, 608, 610, 611, 614, 615, and 617 of this title—

(a) "election" means—

(1) a general, special, primary, or runoff election,

(2) a convention or caucus of a political party held to nominate a candidate,

(3) a primary election held for the selection of delegates to a national nominating convention of a political party, or

(4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President;

(b) a "candidate" means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, to Federal office, if he has—

(1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, or

(2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

(c) "Federal office" means the office of President or Vice President of the United States, or Senator

or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

(d) "political committee" means any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

(e) "contribution"—

(1) means a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business, which shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance thereof that each endorser or guarantor bears to the total number of endorsers or gurantors), made for the purpose of influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for such purposes;

(3) means funds received by a political committee which are transferred to such committee from another political committee or other source;

(4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose; but

(5) does not include—

(A) the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee;

(B) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities;

(C) the sale of any food or beverage by a vendor for use in a candidate's campaign at a charge less than the normal comparable charge, if such charge for use in a candidate's campaign is at least equal to the cost of such food or beverage to the vendor;

(D) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate; or

(E) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sam-

ple ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines or other similar types of general public political advertising;

to the extent that the cumulative value of activities by any person on behalf of any candidate under each of clauses (B), (C), and (D) does not exceed $500 with respect to any election;

(f) "expenditure"—

(1) means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

(3) means the transfer of funds by a political committee to another political committee; but

(4) does not include—

(A) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(B) nonpartisan activity designed to encourage individuals to register to vote or to vote;

(C) any communication by any membership organization or corporation to its members or stockholders, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any person to Federal office;

(D) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities;

(E) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate;

(F) any communication by any person which is not made for the purpose of influencing the nomination for election, or election, of any person to Federal office;

(G) the payment by a State or local committee of a political party of the costs of

preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines or other similar types of general public political advertising;

(H) any costs incurred by a candidate in connection with the solicitation of contributions by such candidate, except that this clause shall not apply with respect to costs incurred by a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 608 (c) of this title; or

(I) any costs incurred by a political committee (as such term is defined by section 608 (b)(2) of this title) with respect to the solicitation of contributions to such political committee or to any general political fund controlled by such political committee, except that this clause shall not apply to exempt costs incurred with respect to the solicitation of contributions to any such political committee made through broadcasting stations, newspapers, magazines, outdoor advertising facilities, and

other similar types of general public political advertising;

to the extent that the cumulative value of activities by any individual on behalf of any candidate under each of clauses (D) or (E) does not exceed $500 with respect to any election;

(g) "person" and "whoever" mean an individual, partnership, committee, association, corporation, or any other organization or group of persons;

(h) "State" means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(i) "political party" means any association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization;

(j) "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Federal Election Commission;

(k) "national committee" means the organization which, by virtue of the bylaws of the political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Federal Election Commission established under section 437c (a) of Title 2; and

(*l*) "principal campaign committee" means the principal campaign committee designated by a candidate under section 432 (f)(1) of Title 2.

§ 608. Limitations on contributions and expenditures.

(a) *Personal funds of candidate and family.*

(1) No candidate may make expenditures from

his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year for nomination for election, or for election, to Federal office in excess of, in the aggregate—

(A) $50,000, in the case of a candidate for the office of President or Vice President of the United States;

(B) $35,000, in the case of a candidate for the office of Senator or for the office of Representative from a State which is entitled to only one Representative; or

(C) $25,000, in the case of a candidate for the office of Representative, or Delegate or Resident Commissioner, in any other State.

For purposes of this paragraph, any expenditure made in a year other than the calendar year in which the election is held with respect to which such expenditure was made, is considered to be made during the calendar year in which such election is held.

(2) For purposes of this subsection, "immediate family" means a candidate's spouse, and any child, parent, grandparent, brother, or sister of the candidate, and the spouses of such persons.

(3) No candidate or his immediate family may make loans or advances from their personal funds in connection with his campaign for nomination for election, or for election, to Federal office unless such loan or advance is evidenced by a written instrument fully disclosing the terms and conditions of such loan or advance.

(4) For purposes of this subsection, any such loan or advance shall be included in computing the total amount of such expenditures only to the ex-

tent of the balance of such loan or advance outstanding and unpaid.

(b) *Contributions by persons and committees.*

(1) Except as otherwise provided by paragraphs (2) and (3), no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000.

(2) No political committee (other than a principal campaign committee) shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $5,000. Contributions by the national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States shall not exceed the limitation imposed by the preceding sentence with respect to any other candidate for Federal office. For purposes of this paragraph, the term "political committee" means an organization registered as a political committee under section 433, Title 2, United States Code, for a period of not less than 6 months which has received contributions from more than 50 persons and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made in a year other than the calendar year in which the election is held with respect to which such contribution was made, is considered to be made during the calendar year in which such election is held.

(4) For purposes of this subsection—

(A) contributions to a named candidate made

to any political committee authorized by such candidate, in writing, to accept contributions on his behalf shall be considered to be contributions made to such candidate; and

(B) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(5) The limitations imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(6) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(c) *Limitations on expenditures.*

(1) No candidate shall make expenditures in excess of—

(A) $10,000,000, in the case of a candidate for nomination for election to the office of President of the United States, except that

the aggregate of expenditures under this subparagraph in any one State shall not exceed twice the expenditure limitation applicable in such State to a candidate for nomination for election to the office of Senator, Delegate, or Resident Commissioner, as the case may be;

(B) $20,000,000, in the case of a candidate for election to the office of President of the United States;

(C) in the case of any campaign for nomination for election by a candidate for the office of Senator or by a candidate for the office of Representative from a State which is entitled to only one Representative, the greater of—

(i) 8 cents multiplied by the voting age population of the State (as certified under subsection (g)); or

(ii) $100,000;

(D) in the case of any campaign for election by a candidate for the office of Senator or by a candidate for the office of Representative from a State which is entitled to only one Representative, the greater of—

(i) 12 cents multiplied by the voting age population of the State (as certified under subsection (g)); or

(ii) $150,000;

(E) $70,000, in the case of any campaign for nomination for election, or for election, by a candidate for the office of Representative in any other State, Delegate from the District of Columbia, or Resident Commissioner; or

(F) $15,000, in the case of any campaign for nomination for election, or for election, by

a candidate for the office of Delegate from Guam or the Virgin Islands.

(2) For purposes of this subsection—

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for the purposes of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(3) The limitations imposed by subparagraphs (C), (D), (E), and (F) of paragraph (1) of this subsection shall apply separately with respect to each election.

(4) The Commission shall prescribe rules under which any expenditure by a candidate for presidential nomination for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(d) *Adjustment of limitations based on price index.*

(1) At the beginning of each calendar year (commencing in 1976), as there become available neces-

sary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the per centum difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (c) and subsection (f) shall be increased by such per centum difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year 1974.

(e) *Expenditure relative to clearly identified candidate.*

(1) No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (c)(2)(B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.

(2) For purposes of paragraph (1)—

(A) "clearly identified" means—

(i) the candidate's name appears;

(ii) a photograph or drawing of the candidate appears; or

(iii) the identity of the candidate is apparent by unambiguous reference; and

(B) "expenditure" does not include any payment made or incurred by a corporation or a labor organization which, under the provisions of the last paragraph of section 610, would not constitute an expenditure by such corporation or labor organization.

(f) *Exceptions for national and State committees.*

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (g)). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for

Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (g)); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(g) *Voting age population estimates.* During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(h) *Knowing violations.* No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(i) *Penalties.* Any person who violates any provision of this section shall be fined not more than $25,000 or imprisoned not more than 1 year, or both.

§ 610. Contributions or expenditures by national banks, corporations or labor organizations.

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $25,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than 1 year, or both; and if the violation was willful, shall be fined not more than $50,000 or imprisoned not more than 2 years or both.

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose,

in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided,* That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

§ 611. Contributions by Government contractors.

Whoever—

(a) entering into any contract with the United States or any department or agency thereof either

for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof or for selling any land or building to the United States or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of—

(1) the completion of performance under, or

(2) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land or buildings,

directly or indirectly makes any contribution of money or other thing of value, or promises expressly or impliedly to make any such contribution, to any political party, committee, or candidate for public office or to any person for any political purpose or use; or

(b) knowingly solicits any such contribution from any such person for any such purpose during any such period;

shall be fined not more than $25,000 or imprisoned not more than 5 years, or both.

This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation or labor organization for the purpose of influencing the nomination for election, or election, of any person to Federal office, unless the provisions of section 610 of this title prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, such fund.

For purposes of this section, the term "labor organi-

zation" has the meaning given it by section 610 of this title.

TITLE 26. INTERNAL REVENUE CODE

§ 6096. Designation by individuals.

(a) *In general.* Every individual (other than a nonresident alien) whose income tax liability for the taxable year is $1 or more may designate that $1 shall be paid over to the Presidential Election Campaign Fund in accordance with the provisions of section 9006 (a). In the case of a joint return of husband and wife having an income tax liability of $2 or more, each spouse may designate that $1 shall be paid to the fund.

(b) *Income tax liability.* For purposes of subsection (a), the income tax liability for an individual for any taxable year is the amount of the tax imposed by chapter 1 on such individual for such taxable year (as shown on his return), reduced by the sum of the credits (as shown in his return) allowable under sections 33, 37, 38, 40, and 41.

(c) *Manner and time of designation.* A designation under subsection (a) may be made with respect to any taxable year—

(1) at the time of filing the return of the tax imposed by chapter 1 for such taxable year, or

(2) at any other time (after the time of filing the return of the tax imposed by chapter 1 for such taxable year) specified in regulations prescribed by the Secretary or his delegate.

Such designation shall be made in such manner as the Secretary or his delegate prescribes by regulations except that, if such designation is made at the time of filing the return of the tax imposed by chapter 1 for such taxable year, such designation shall be made either on the

first page of the return or on the page bearing the taxpayer's signature.

CHAPTER 95—PRESIDENTIAL ELECTION CAMPAIGN FUND

§ 9001. Short title.

This chapter may be cited as the "Presidential Election Campaign Fund Act."

§ 9002. Definitions.

For purposes of this chapter—

(1) The term "authorized committee" means, with respect to the candidates of a political party for President and Vice President of the United States, any political committee which is authorized in writing by such candidates to incur expenses to further the election of such candidates. Such authorization shall be addressed to the chairman of such political committee, and a copy of such authorization shall be filed by such candidates with the Commission. Any withdrawal of any authorization shall also be in writing and shall be addressed and filed in the same manner as the authorization.

(2) The term "candidate" means, with respect to any presidential election, an individual who—

(A) has been nominated for election to the office of President of the United States or the office of Vice President of the United States by a major party, or

(B) has qualified to have his name on the election ballot (or to have the names of electors pledged to him on the election ballot) as the candidate of a political party for election to either such office in 10 or more States.

For purposes of paragraphs (6) and (7) of this section and purposes of section 9004 (a)(2), the term "candidate" means, with respect to any preceding presidential

election, an individual who received popular votes for the office of President in such election.

(3) The term "Commission" means the Federal Election Commission established by section 437c (a)(1) of Title 2, United States Code.

(4) The term "eligible candidates" means the candidates of a political party for President and Vice President of the United States who have met all applicable conditions for eiligibility to receive payments under this chapter set forth in section 9003.

(5) The term "fund" means the Presidential Election Campaign Fund established by section 9006 (a).

(6) The term "major party" means, with respect to any presidential election, a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 25 percent or more of the total number of popular votes received by all candidates for such office.

(7) The term "minor party" means, with respect to any presidential election, a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office.

(8) The term "new party" means, with respect to any presidential election, a political party which is neither a major party nor a minor party.

(9) The term "political committee" means any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.

(10) The term "presidential election" means the election of presidential and vice-presidential electors.

(11) The term "qualified campaign expense" means an expense—

(A) incurred—

(i) by the candidate of a political party for the office of President to further his election to such office or to further the election of the candidate of such political party for the office of Vice President, or both,

(ii) by the candidate of a political party for the office of Vice President to further his election to such office or to further the election of the candidate of such political party for the office of President, or both, or

(iii) by an authorized committee of the candidates of a political party for the offices of President and Vice President to further the election of either or both of such candidates to such offices;

(B) incurred within the expenditure report period (as defined in paragraph (12)), or incurred before the beginning of such period to the extent such expense is for property, services, or facilities used during such period; and

(C) neither the incurring nor payment of which constitutes a violation of any law of the United States or of the State in which such expense is incurred or paid.

An expense shall be considered as incurred by a candidate or an authorized committee if it is incurred by a person authorized by such candidate or such committee, as the case may be, to incur such expense on behalf of such candidate or such committee. If an authorized committee of the candidates of a political party for

President and Vice President of the United States also incurs expenses to further the election of one or more other individuals to Federal, State, or local elective public office, expenses incurred by such committee which are not specifically to further the election of such other individual or individuals shall be considered as incurred to further the election of such candidates for President and Vice President in such proportion as the Commission prescribes by rules or regulations.

(12) The term "expenditure report period" with respect to any presidential election means—

(A) in the case of a major party, the period beginning with the first day of September before the election, or, if earlier, with the date on which such major party at its national convention nominated its candidate for election to the office of President of the United States, and ending 30 days after the date of the presidential election; and

(B) in the case of a party which is not a major party, the same period as the expenditure report period of the major party which has the shortest expenditure report period for such presidential election under subparagraph (A).

§ 9003. Condition for eligibility for payments.

(a) *In general.* In order to be eligible to receive any payments under section 9006, the candidates of a political party in a presidential election shall, in writing—

(1) agree to obtain and furnish to the Commission such evidence as it may request of the qualified campaign expenses of such candidates;

(2) agree to keep and furnish to the Commission such records, books, and other information as it may request; and

(3) agree to an audit and examination by the

Commission under section 9007 and to pay any amounts required to be paid under such section.

(b) *Major parties.* In order to be eligible to receive any payments under section 9006, the candidates of a major party in a presidential election shall certify to the Commission, under penalty of perjury, that—

(1) such candidates and their authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which they will be entitled under section 9004; and

(2) no contributions to defray qualified campaign expenses have been or will be accepted by such candidates or any of their authorized committees except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006 (d), and no contributions to defray expenses which would be qualified campaign expenses but for subparagraph (C) of section 9002 (11) have been or will be accepted by such candidates or any of their authorized committees.

Such certification shall be made within such time prior to the day of the presidential election as the Commission shall prescribe by rules or regulations.

(c) *Minor and new parties.* In order to be eligible to receive any payments under section 9006, the candidates of a minor or new party in a presidential election shall certify to the Commission, under penalty of perjury, that—

(1) such candidates and their authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party are entitled under section 9004; and

(2) such candidates and their authorized committees will accept and expend or retain contributions to defray qualified campaign expenses only to the extent that the qualified campaign expenses incurred by such candidates and their authorized committees certified to under paragraph (1) exceed the aggregate payments received by such candidates out of the fund pursuant to section 9006.

Such certification shall be made within such time prior to the day of the presidential election as the Commission shall prescribe by rules or regulations.

§ 9004. Entitlement of eligible candidates to payments.

(a) *In general.* Subject to the provisions of this chapter—

(1) The eligible candidates of each major party in a presidential election shall be entitled to equal payments under section 9006 in an amount which, in the aggregate, shall not exceed the expenditure limitations applicable to such candidates under section 608 (c)(1)(B) of Title 18, United States Code.

(2)(A) The eligible candidates of a minor party in a presidential election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the major parties in the preceding presidential election.

(B) If the candidate of one or more political parties (not including a major party) for the office of President was a candidate for such office in the preceding presidential election and received 5 per-

cent or more but less than 25 percent of the total number of popular votes received by all candidates for such office, such candidate and his running mate for the office of Vice President, upon compliance with the provisions of section 9003 (a) and (c), shall be treated as eligible candidates entitled to payments under section 9006 in an amount computed as provided in subparagraph (A) by taking into account all the popular votes received by such candidate for the office of President in the preceding presidential election. If eligible candidates of a minor party are entitled to payments under this subparagraph, such entitlement shall be reduced by the amount of the entitlement allowed under subparagraph (A).

(3) The eligible candidates of a minor party or a new party in a presidential election whose candidate for President in such election receives, as such candidate, 5 percent or more of the total number of popular votes cast for the office of President in such election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as the number of popular votes received by such candidate in such election bears to the average number of popular votes received in such election by the candidates for President of the major parties. In the case of eligible candidates entitled to payments under paragraph (2), the amount allowable under this paragraph shall be limited to the amount, if any, by which the entitlement under the preceding sentence exceeds the amount of the entitlement under paragraph (2).

(b) *Limitations.* The aggregate payments to which the eligible candidates of a political party shall be en-

titled under subsections (a)(2) and (3) with respect to a presidential election shall not exceed an amount equal to the lower of—

(1) the amount of qualified campaign expenses incurred by such eligible candidates and their authorized committees, reduced by the amount of contributions to defray qualified campaign expenses received and expended or retained by such eligible candidates and such committees; or

(2) the aggregate payments to which the eligible candidates of a major party are entitled under subsection (a)(1), reduced by the amount of contributions described in paragraph (1) of this subsection.

(c) *Restrictions.* The eligible candidates of a political party shall be entitled to payments under subsection (a) only—

(1) to defray qualified campaign expenses incurred by such eligible candidates or their authorized committees; or

(2) to repay loans the proceeds of which were used to defray such qualified campaign expenses, or otherwise to restore funds (other than contributions to defray qualified campaign expenses received and expended by such candidates or such committees) used to defray such qualified campaign expenses.

§ 9005. Certification by Commission.

(a) *Initial certifications.* Not later than 10 days after the candidates of a political party for President and Vice President of the United States have met all applicable conditions for eligibility to receive payments under this chapter set forth in section 9003, the Commission shall certify to the Secretary for payment to such eligible candidates under section 9006 payment in full of amounts to which such candidates are entitled under section 9004.

(b) *Finality of certifications and determinations.* Initial certifications by the Commission under subsection (a), and all determinations made by it under this chapter shall be final and conclusive, except to the extent that they are subject to examination and audit by the Commission under section 9007 and judicial review under section 9011.

§ 9006. Payments to eligible candidates.

(a) *Establishment of campaign fund.* There is hereby established on the books of the Treasury of the United States a special fund to be known as the "Presidential Election Campaign Fund." The Secretary shall, from time to time, transfer to the fund an amount not in excess of the sum of the amounts designated (subsequent to the previous Presidential election) to the fund by individuals under section 6096. There is appropriated to the fund for each fiscal year, out of amounts in the general fund of the Treasury not otherwise appropriated, an amount equal to the amounts so designated during each fiscal year, which shall remain available to the fund without fiscal year limitation.

(b) *Transfer to the general fund.* If, after a Presidential election and after all eligible candidates have been paid the amount which they are entitled to receive under this chapter, there are moneys remaining in the fund, the Secretary shall transfer the moneys so remaining to the general fund of the Treasury.

(c) *Payments from the fund.* Upon receipt of a certification from the Commission under section 9005 for payment to the eligible candidates of a political party, the Secretary shall pay to such candidates out of the fund the amount certified by the Commission. Amounts paid to any such candidates shall be under the control of such candidates.

(d) *Insufficient amounts in fund.* If at the time of a

certification by the Commission under section 9005 for payment to the eligible candidates of a political party, the Secretary or his delegate determines that the moneys in the fund are not, or may not be, sufficient to satisfy the full entitlements of the eligible candidates of all political parties, he shall withhold from such payment such amount as he determines to be necessary to assure that the eligible candidates of each political party will receive their pro rata share of their full entitlement. Amounts withheld by reason of the preceding sentence shall be paid when the Secretary or his delegate determines that there are sufficient moneys in the fund to pay such amounts, or portions thereof, to all eligible candidates from whom amounts have been withheld, but, if there are not sufficient moneys in the fund to satisfy the full entitlement of the eligible candidates of all political parties, the amounts so withheld shall be paid in such manner that the eligible candidates of each political party receive their pro rata share of their full entitlement.

§ 9007. Examinations and audits; repayments.

(a) *Examinations and audits.* After each presidential election, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of the candidates of each political party for President and Vice President.

(b) *Repayments.*

(1) If the Commission determines that any portion of the payments made to the eligible candidates of a political party under section 9006 was in excess of the aggregate payments to which candidates were entitled under section 9004, it shall so notify such candidates, and such candidates shall pay to the Secretary an amount equal to such portion.

(2) If the Commission determines that the eligible candidates of a political party and their authorized

committees incurred qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party were entitled under section 9004, it shall notify such candidates of the amount of such excess and such candidates shall pay to the Secretary an amount equal to such amount.

(3) If the Commission determines that the eligible candidates of a major party or any authorized committee of such candidates accepted contributions (other than contributions to make up deficiencies in payments out of the fund on account of the application of section 9006 (d)) to defray qualified campaign expenses (other than qualified campaign expenses with respect to which payment is required under paragraph (2)), it shall notify such candidates of the amount of the contributions so accepted, and such candidates shall pay to the Secretary an amount equal to such amount.

(4) If the Commission determines that any amount of any payment made to the eligible candidates of a political party under section 9006 was used for any purpose other than—

(A) to defray the qualified campaign expenses with respect to which such payment was made; or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used to defray such qualified campaign expenses,

it shall notify such candidates of the amount so used, and such candidates shall pay to the Secretary an amount equal to such amount.

(5) No payment shall be required from the eligi-

ble candidates of a political party under this subsection to the extent that such payment, when added to other payments required from such candidates under this subsection, exceeds the amount of payments received by such candidates under section 9006.

(c) *Notification.* No notification shall be made by the Commission under subsection (b) with respect to a presidential election more than 3 years after the day of such election.

(d) *Deposit of repayments.* All payments received by the Secretary under subsection (b) shall be deposited by him in the general fund of the Treasury.

§ 9008. Payments for presidential nominating conventions.

(a) *Establishment of accounts.* The Secretary shall maintain in the fund, in addition to any account which he maintains under section 9006 (a), a separate account for the national committee of each major party and minor party. The Secretary shall deposit in each such account an amount equal to the amount which each such committee may receive under subsection (b). Such deposits shall be drawn from amounts designated by individuals under section 6096 and shall be made before any transfer is made to any account for any eligible candidate under section 9006 (a).

(b) *Entitlement to payments from the fund.*

(1) *Major parties.* Subject to the provisions of this section, the national committee of a major party shall be entitled to payments under paragraph (3), with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed $2 million.

(2) *Minor parties.* Subject to the provisions of this section, the national committee of a minor party

shall be entitled to payments under paragraph (3), with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed an amount which bears the same ratio to the amount the national committee of a major party is entitled to receive under paragraph (1) as the number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the United States of the major parties in the preceding presidential election.

(3) *Payments.* Upon receipt of certification from the Commission under subsection (g), the Secretary shall make payments from the appropriate account maintained under subsection (a) to the national committee of a major party or minor party which elects to receive its entitlement under this subsection. Such payments shall be available for use by such committee in accordance with the provisions of subsection (c).

(4) *Limitation.* Payments to the national committee of a major party or minor party under this subsection from the account designated for such committee shall be limited to the amounts in such account at the time of payment.

(5) *Adjustment of entitlements.* The entitlements established by this subsection shall be adjusted in the same manner as expenditure limitations established by section 608 (c) and section 608 (f) of Title 18, United States Code, are adjusted pursuant to the provisions of section 608 (d) of such title.

(c) *Use of funds.* No part of any payment made under subsection (b) shall be used to defray the expenses

of any candidate or delegate who is participating in any presidential nominating convention. Such payments shall be used only—

(1) to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) by or on behalf of the national committee receiving such payments; or

(2) to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds (other than contributions to defray such expenses received by such committee) used to defray such expenses.

(d) *Limitation of expenditures.*

(1) *Major parties.* Except as provided by paragraph (3), the national committee of a major party may not make expenditures with respect to a presidential nominating convention which, in the aggregate, exceed the amount of payments to which such committee is entitled under subsection (b)(1).

(2) *Minor parties.* Except as provided by paragraph (3), the national committee of a minor party may not make expenditures with respect to a presidential nominating convention which, in the aggregate, exceed the amount of the entitlement of the national committee of a major party under subsection (b)(1).

(3) *Exception.* The Commission may authorize the national committee of a major party or minor party to make expenditures which, in the aggregate, exceed the limitation established by paragraph (1) or paragraph (2) of this subsection. Such authorization shall be based upon a determination by the Commission that, due to extraordinary and unforeseen circumstances, such expenditures are necessary

to assure the effective operation of the presidential nominating convention by such committee.

(e) *Availability of payments.* The national committee of a major party or minor party may receive payments under subsection (b)(3) beginning on July 1 of the calendar year immediately preceding the calendar year in which a presidential nominating convention of the political party involved is held.

(f) *Transfer to the fund.* If, after the close of a presidential nominating convention and after the national committee of the political party involved has been paid the amount which it is entitled to receive under this section, there are moneys remaining in the account of such national committee, the Secretary shall transfer the moneys so remaining to the fund.

(g) *Certification by Commission.* Any major party or minor party may file a statement with the Commission in such form and manner and at such times as it may require, designating the national committee of such party. Such statement shall include the information required by section 433 (b) of Title 2, United States Code, together with such additional information as the Commission may require. Upon receipt of a statement filed under the preceding sentences, the Commission promptly shall verify such statement according to such procedures and criteria as it may establish and shall certify to the Secretary for payment in full to any such committee of amounts to which such committee may be entitled under subsection (b). Such certifications shall be subject to an examination and audit which the Commission shall conduct no later than December 31 of the calendar year in which the presidential nominating convention involved is held.

(h) *Repayments.* The Commission shall have the same authority to require repayments from the national

committee of a major party or a minor party as it has with respect to repayments from any eligible candidate under section 9007 (b). The provisions of section 9007 (c) and section 9007 (d) shall apply with respect to any repayment required by the Commission under this subsection.

§ 9009. Reports to Congress; regulations.

(a) *Reports.* The Commission shall, as soon as practicable after each presidential election, submit a full report to the Senate and House of Representatives setting forth—

(1) the qualified campaign expenses (shown in such detail as the Commission determines necessary) incurred by the candidates of each political party and their authorized committees;

(2) the amounts certified by it under section 9005 for payment to eligible candidates of each political party;

(3) the amount of payments, if any, required from such candidates under section 9007, and the reasons for each payment required;

(4) the expenses incurred by the national committee of a major party or minor party with respect to a presidential nominating convention;

(5) the amounts certified by it under section 9008 (g) for payment to each such committee; and

(6) the amount of payments, if any, required from such committees under section 9008 (h), and the reasons for each such payment.

Each report submitted pursuant to this section shall be printed as a Senate document.

(b) *Regulations, etc.* The Commission is authorized to prescribe such rules and regulations in accordance with the provisions of subsection (c), to conduct such

examinations and audits (in addition to the examinations and audits required by section 9007 (a)), to conduct such investigations, and to require the keeping and submission of such books, records, and information, as it deems necessary to carry out the functions and duties imposed on it by this chapter.

(c) *Review of regulations.*

(1) The Commission, before prescribing any rule or regulation under subsection (b), shall transmit a statement with respect to such rule or regulation to the Senate and to the House of Representatives, in accordance with the provisions of this subsection. Such statement shall set forth the proposed rule or regulation and shall contain a detailed explanation and justification of such rule or regulation.

(2) If either such House does not, through appropriate action, disapprove the proposed rule or regulation set forth in such statement no later than 30 legislative days after receipt of such statement, then the Commission may prescribe such rule or regulation. The Commission may not prescribe any rule or regulation which is disapproved by either such House under this paragraph.

(3) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

§ 9010. Participation by Commission in judicial proceedings.

(a) *Appearance by counsel.* The Commission is authorized to appear in and defend against any action filed under section 9011, either by attorneys employed in its office or by counsel whom it may appoint without regard to the provisions of Title 5, United States Code, governing appointments in the competitive service, and

whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title.

(b) *Recovery of certain payments.* The Commission is authorized through attorneys and counsel described in subsection (a) to appear in the district courts of the United States to seek recovery of any amounts determined to be payable to the Secretary as a result of examination and audit made pursuant to section 9007.

(c) *Declaratory and injunctive relief.* The Commission is authorized through attorneys and counsel described in subsection (a) to petition the courts of the United States for declaratory or injunctive relief concerning any civil matter covered by the provisions of this subtitle or section 6096. Upon application of the Commission an action brought pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) *Appeal.* The Commission is authorized on behalf of the United States to appeal from, and to petition the Supreme Court for certiorari to review, judgments or decrees entered with respect to actions in which it appears pursuant to the authority provided in this section.

§ 9011. Judicial review.

(a) *Review of certification, determination, or other action by the Commission.* Any certification, determination, or other action by the Commission made or taken pursuant to the provisions of this chapter shall be subject to review by the United States Court of Appeals for

the District of Columbia upon petition filed in such Court by any interested person. Any petition filed pursuant to this section shall be filed within 30 days after the certification, determination, or other action by the Commission for which review is sought.

(b) *Suits to implement chapter.*

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or contrue [1] any provisions of this chapter.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

§ 9012. Criminal penalties.

(a) *Excess expenses.*

(1) It shall be unlawful for an eligible candidate of a political party for President and Vice President in a presidential election or any of his authorized committees knowingly and willfully to incur quali-

[1] So in original.

fied campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party are entitled under section 9004 with respect to such election. It shall be unlawful for the national committee of a major party or minor party knowingly and willfully to incur expenses with respect to a presidential nominating convention in excess of the expenditure limitation applicable with respect to such committee under section 9008 (d), unless the incurring of such expenses is authorized by the Commission under section 9008 (d)(3).

(2) Any person who violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than 1 year or both. In the case of a violation by an authorized committee, any officer or member of such committee who knowingly and willfully consents to such violation shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

(b) *Contributions.*

(1) It shall be unlawful for an eligible candidate of a major party in a presidential election or any of his authorized committees knowingly and willfully to accept any contribution to defray qualified campaign expenses, except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006 (d), or to defray expenses which would be qualified campaign expenses but for subparagraph (C) of section 9002 (11).

(2) It shall be unlawful for an eligible candidate of a political party (other than a major party) in a presidential election or any of his authorized committees knowingly and willfully to accept and expend or retain contributions to defray qualified

campaign expenses in an amount which exceeds the qualified campaign expenses incurred with respect to such election by such eligible candidate and his authorized committees.

(3) Any person who violates paragraph (1) or (2) shall be fined not more than $5,000, or imprisoned not more than 1 year, or both. In the case of a violation by an authorized committee, any officer or member of such committee who knowingly and willfully consents to such violation shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

(c) *Unlawful use of payments.*

(1) It shall be unlawful for any person who receives any payment under section 9006, or to whom any portion of any payment received under such section is transferred, knowingly and willfully to use, or authorize the use of, such payment or such portion for any purpose other than—

(A) to defray the qualified campaign expenses with respect to which such payment was made; or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray such qualified campaign expenses.

(2) It shall be unlawful for the national committee of a major party or minor party which receives any payment under section 9008 (b)(3) to use, or authorize the use of, such payment for any purpose other than a purpose authorized by section 9008 (c).

(3) Any person who violates paragraph (1) shall

be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(d) *False statements, etc.*

(1) It shall be unlawful for any person knowingly and willfully—

(A) to furnish any false, fictitious, or fraudulent evidence, books, or information to the Commission under this subtitle, or to include in any evidence, books, or information so furnished any misrepresentation of a material fact, or to falsify or conceal any evidence, books, or information relevant to a certification by the Commission or an examination and audit by the Commission under this chapter; or

(B) to fail to furnish to the Commission any records, books, or information requested by it for purposes of this chapter.

(2) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(e) *Kickbacks and illegal payments.*

(1) It shall be unlawful for any person knowingly and willfully to give or accept any kickback or any illegal payment in connection with any qualified campaign expense of eligible candidates or their authorized committees. It shall be unlawful for the national committee of a major party or minor party knowingly and willfully to give or accept any kickback or any illegal payment in connection with any expense incurred by such committee with respect to a presidential nominating convention.

(2) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(3) In addition to the penalty provided by paragraph (2), any person who accepts any kickback or illegal payment in connection with any qualified campaign expense of eligible candidates or their authorized committees, or in connection with any expense incurred by the national committee of a major party or minor party with respect to a presidential nominating convention, shall pay to the Secretary, for deposit in the general fund of the Treasury, an amount equal to 125 percent of the kickback or payment received.

(f) *Unauthorized expenditures and contributions.*

(1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

(2) This subsection shall not apply to—

(A) expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting the news or in taking editorial positions; or

(B) expenditures by any organization described in section 501 (c) which is exempt from tax under section 501 (a) in communicating to its members the views of that organization.

(3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and

any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

(g) *Unauthorized disclosure of information.*

(1) It shall be unlawful for any individual to disclose any information obtained under the provisions of this chapter except as may be required by law.

(2) Any person who violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

CHAPTER 96—PRESIDENTIAL PRIMARY MATCHING PAYMENT ACCOUNT

§ 9031. Short title.

This chapter may be cited as the "Presidential Primary Matching Payment Account Act."

§ 9032. Definitions.

For the purposes of this chapter—

(1) The term "authorized committee" means, with respect to the candidates of a political party for President and Vice President of the United States, any political committee which is authorized in writing by such candidates to incur expenses to further the election of such candidates. Such authorization shall be addressed to the chairman of such political committee, and a copy of such authorization shall be filed by such candidates with the Commission. Any withdrawal of any authorization shall also be in writing and shall be addressed and filed in the same manner as the authorization.

(2) The term "candidate" means an individual who seeks nomination for election to be President of the United States. For purposes of this para-

graph, an individual shall be considered to seek nomination for election if he—

(A) takes the action necessary under the law of a State to qualify himself for nomination for election;

(B) receives contributions or incurs qualified campaign expenses; or

(C) gives his consent for any other person to receive contributions or to incur qualified campaign expenses on his behalf.

(3) The term "Commission" means the Federal Election Commission established by section 437c (a)(1) of Title 2, United States Code.

(4) Except as provided by section 9034 (a), the term "contribution"—

(A) means a gift, subscription, loan, advance, or deposit of money, or anything of value, the payment of which was made on or after the beginning of the calendar year immediately preceding the calendar year of the presidential election with respect to which such gift, subscription, loan, advance, or deposit of money, or anything of value, is made for the purpose of influencing the result of a primary election;

(B) means a contract, promise, or agreement, whether or not legally enforceable, to make a contribution for any such purpose;

(C) means funds received by a political committee which are transferred to that committee from another committee; and

(D) means the payment by any person other than a candidate, or his authorized committee, of compensation for the personal services of another person which are rendered to the candidate or committee without charge; but

(E) does not include—

(i) except as provided in subparagraph (D), the value of personal services rendered to or for the benefit of a candidate by an individual who receives no compensation for rendering such service to or for the benefit of the candidate; or

(ii) payments under section 9037.

(5) The term "matching payment account" means the Presidential Primary Matching Payment Account established under section 9037 (a).

(6) The term "matching payment period" means the period beginning with the beginning of the calendar year in which a general election for the office of President of the United States will be held and ending on the date on which the national convention of the party whose nomination a candidate seeks nominates its candidate for the office of President of the United States, or, in the case of a party which does not make such nomination by national convention, ending on the earlier of—

(A) the date such party nominates its candidate for the office of President of the United States; or

(B) the last day of the last national convention held by a major party during such calendar year.

(7) The term "primary election" means an election, including a runoff election or a nominating convention or caucus held by a political party, for the selection of delegates to a national nominating convention of a political party, or for the expression of a preference for the nomination of persons for election to the office of President of the United States.

(8) The term "political committee" means any individual, committee, association, or organization (whether or not incorporated) which accepts contributions or incurs qualified campaign expenses for the purpose of influencing, or attempting to influence, the nomination of any person for election to the office of President of the United States.

(9) The term "qualified campaign expense" means a purchase, payment, distribution, loan, advance, deposit, or gift of money or of anything of value—

(A) incurred by a candidate, or by his authorized committee, in connection with his campaign for nomination for election; and

(B) neither the incurring nor payment of which constitutes a violation of any law of the United States or of the State in which the expense is incurred or paid.

For purposes of this paragraph, an expense is incurred by a candidate or by an authorized committee if it is incurred by a person specifically authorized in writing by the candidate or committee, as the case may be, to incur such expense on behalf of the candidate or the committee.

(10) The term "State" means each State of the United States and the District of Columbia.

§ 9033. Eligibility for payments.

(a) *Conditions.* To be eligible to receive payments under section 9037, a candidate shall, in writing—

(1) agree to obtain and furnish to the Commission any evidence it may request of qualified campaign expenses;

(2) agree to keep and furnish to the Commission any records, books, and other information it may request; and

(3) agree to an audit and examination by the

Commission under section 9038 and to pay any amounts required to be paid under such section.

(b) *Expense limitation; declaration of intent; minimum contributions.* To be eligible to receive payments under section 9037, a candidate shall certify to the Commission that—

(1) the candidate and his authorized committees will not incur qualified campaign expenses in excess of the limitation on such expenses under section 9035;

(2) the candidate is seeking nomination by a political party for election to the office of President of the United States;

(3) the candidate has received matching contributions which in the aggregate, exceed $5,000 in contributions from residents of each of at least 20 States; and

(4) the aggregate of contributions certified with respect to any person under paragraph (3) does not exceed $250.

§ 9034. Entitlement of eligible candidates to payments.

(a) *In general.* Every candidate who is eligible to receive payments under section 9033 is entitled to payments under section 9037 in an amount equal to the amount of each contribution received by such candidate on or after the beginning of the calendar year immediately preceding the calendar year of the presidential election with respect to which such candidate is seeking nomination, or by his authorized committees, disregarding any amount of contributions from any person to the extent that the total of the amounts contributed by such person on or after the beginning of such preceding calendar year exceeds $250. For purposes of this subsection and section 9033 (b), the term "contribution" means a gift of money made by a written instrument which identi-

fies the person making the contribution by full name and mailing address, but does not include a subscription, loan, advance, or deposit of money, or anything of value or anything described in subparagraph (B), (C), or (D) of section 9032 (4).

(b) *Limitations.* The total amount of payments to which a candidate is entitled under subsection (a) shall not exceed 50 percent of the expenditure limitation applicable under section 608 (c)(1)(A) of Title 18, United States Code.

§ 9035. Qualified campaign expense limitation.

No candidate shall knowingly incur qualified campaign expenses in excess of the expenditure limitation applicable under section 608 (c)(1)(A) of Title 18, United States Code.

§ 9036. Certification by Commission.

(a) *Initial certifications.* Not later than 10 days after a candidate establishes his eligibility under section 9033 to receive payments under section 9037, the Commission shall certify to the Secretary for payment to such candidate under section 9037 payment in full of amounts to which such candidate is entitled under section 9034. The Commission shall make such additional certifications as may be necessary to permit candidates to receive payments for contributions under section 9037.

(b) *Finality of determinations.* Initial certifications by the Commission under subsection (a), and all determinations made by it under this chapter, are final and conclusive, except to the extent that they are subject to examination and audit by the Commission under section 9038 and judicial review under section 9041.

§ 9037. Payments to eligible candidates.

(a) *Establishment of account.* The Secretary shall maintain in the Presidential Election Campaign Fund

established by section 9006 (a), in addition to any account which he maintains under such section, a separate account to be known as the Presidential Primary Matching Payment Account. The Secretary shall deposit into the matching payment account, for use by the candidate of any political party who is eligible to receive payments under section 9033, the amount available after the Secretary determines that amounts for payments under section 9006 (c) and for payments under section 9008 (b)(3) are available for such payments.

(b) *Payments from the matching payment account.* Upon receipt of a certification from the Commission under section 9036, but not before the beginning of the matching payment period, the Secretary or his delegate shall promptly transfer the amount certified by the Commission from the matching payment account to the candidate. In making such transfers to candidates of the same political party, the Secretary or his delegate shall seek to achieve an equitable distribution of funds available under subsection (a), and the Secretary or his delegate shall take into account, in seeking to achieve an equitable distribution, the sequence in which such certifications are received.

§ 9038. Examinations and audits; repayments.

(a) *Examinations and audits.* After each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received payments under section 9037.

(b) *Repayments.*

(1) If the Commission determines that any portion of the payments made to a candidate from the matching payment account was in excess of the aggregate amount of payments to which such candidate was entitled under section 9034, it shall

notify the candidate, and the candidate shall pay to the Secretary or his delegate an amount equal to the amount of excess payments.

(2) If the Commission determines that any amount of any payment made to a candidate from the matching payment account was used for any purpose other than—

(A) to defray the qualified campaign expenses with respect to which such payment was made; or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray qualified campaign expenses;

it shall notify such candidate of the amount so used, and the candidate shall pay to the Secretary or his delegate an amount equal to such amount.

(3) Amounts received by a candidate from the matching payment account may be retained for the liquidation of all obligations to pay qualified campaign expenses incurred for a period not exceeding 6 months after the end of the matching payment period. After all obligations have been liquidated, that portion of any unexpended balance remaining in the candidate's accounts which bears the same ratio to the total unexpended balance as the total amount received from the matching payment account bears to the total of all deposits made into the candidate's accounts shall be promptly repaid to the matching payment account.

(c) *Notification.* No notification shall be made by the Commission under subsection (b) with respect to a matching payment period more than 3 years after the end of such period.

(d) *Deposit of repayments.* All payments received by the Secretary or his delegate under subsection (b) shall be deposited by him in the matching payment account.

§ 9039. Reports to Congress; regulations.

(a) *Reports.* The Commission shall, as soon as practicable after each matching payment period, submit a full report to the Senate and House of Representatives setting forth—

(1) the qualified campaign expenses (shown in such detail as the Commission determines necessary) incurred by the candidates of each political party and their authorized committees;

(2) the amounts certified by it under section 9036 for payment to each eligible candidate; and

(3) the amount of payments, if any, required from candidates under section 9038, and the reasons for each payment required.

Each report submitted pursuant to this section shall be printed as a Senate document.

(b) *Regulations, etc.* The Commission is authorized to prescribe rules and regulations in accordance with the provisions of subsection (c), to conduct examinations and audits (in addition to the examinations and audits required by section 9038 (a)), to conduct investigations, and to require the keeping and submission of any books, records, and information, which it determines to be necessary to carry out its responsibilities under this chapter.

(c) *Review of regulations.*

(1) The Commission, before prescribing any rule or regulation under subsection (b), shall transmit a statement with respect to such rule or regulation to the Senate and to the House of Representatives,

in accordance with the provisions of this subsection. Such statement shall set forth the proposed rule or regulation and shall contain a detailed explanation and justification of such rule or regulation.

(2) If either such House does not, through appropriate action, disapprove the proposed rule or regulation set forth in such statement no later than 30 legislative days after receipt of such statement, then the Commission may prescribe such rule or regulation. The Commission may not prescribe any rule or regulation which is disapproved by either such House under this paragraph.

(3) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

§ 9040. Participation by Commission in judicial proceedings.

(a) *Appearance by counsel.* The Commission is authorized to appear in and defend against any action instituted under this section, either by attorneys employed in its office or by counsel whom it may appoint without regard to the provisions of Title 5, United States Code, governing appointments in the competitive service, and whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title.

(b) *Recovery of certain payments.* The Commission is authorized, through attorneys and counsel described in subsection (a), to institute actions in the district courts of the United States to seek recovery of any amounts determined to be payable to the Secretary or his delegate as a result of an examination and audit made pursuant to section 9038.

(c) *Injunctive relief.* The Commission is authorized, through attorneys and counsel described in subsection (a), to petition the courts of the United States for such injunctive relief as is appropriate to implement any provision of this chapter.

(d) *Appeal.* The Commission is authorized on behalf of the United States to appeal from, and to petition the Supreme Court for certiorari to review, judgments or decrees entered with respect to actions in which it appears pursuant to the authority provided in this section.

§ 9041. Judicial review.

(a) *Review of agency action by the Commission.* Any agency action by the Commission made under the provisions of this chapter shall be subject to review by the United States Court of Appeals for the District of Columbia Circuit upon petition filed in such court within 30 days after the agency action by the Commission for which review is sought.

(b) *Review procedures.* The provisions of chapter 7 of Title 5, United States Code, apply to judicial review of any agency action, as defined in section 551 (13) of Title 5, United States Code, by the Commission.

§ 9042. Criminal penalties.

(a) *Excess campaign expenses.* Any person who violates the provisions of section 9035 shall be fined not more than $25,000, or imprisoned not more than 5 years, or both. Any officer or member of any political committee who knowingly consents to any expenditure in violation of the provisions of section 9035 shall be fined not more than $25,000, or imprisoned not more than 5 years, or both.

(b) *Unlawful use of payments.*

(1) It is unlawful for any person who receives any payment under section 9037, or to whom any portion

of any such payment is transferred, knowingly and willfully to use, or authorize the use of, such payment or such portion for any purpose other than—

(A) to defray qualified campaign expenses; or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray qualified campaign expenses.

(2) Any person who violates the provisions of paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(c) *False statements, etc.*

(1) It is unlawful for any person knowingly and willfully—

(A) to furnish any false, fictitious, or fraudulent evidence, books, or information to the Commission under this chapter, or to include in any evidence, books, or information so furnished any misrepresentation of a material fact, or to falsify or conceal any evidence, books, or information relevant to a certification by the Commission or an examination and audit by the Commission under this chapter; or

(B) to fail to furnish to the Commission any records, books, or information requested by it for purposes of this chapter.

(2) Any person who violates the provisions of paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(d) *Kickbacks and illegal payments.*

(1) It is unlawful for any person knowingly and willfully to give or accept any kickback or any illegal

payment in connection with any qualified campaign expense of a candidate, or his authorized committees, who receives payments under section 9037.

(2) Any person who violates the provisions of paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(3) In addition to the penalty provided by paragraph (2), any person who accepts any kickback or illegal payment in connection with any qualified campaign expense of a candidate or his authorized committees shall pay to the Secretary for deposit in the matching payment account, an amount equal to 125 percent of the kickback or payment received.

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

For reasons set forth more fully later, I dissent from those parts of the Court's holding sustaining the statutory provisions (a) for disclosure of small contributions, (b) for limitations on contributions, and (c) for public financing of Presidential campaigns. In my view, the Act's disclosure scheme is impermissibly broad and violative of the First Amendment as it relates to reporting contributions in excess of $10 and $100. The contribution limitations infringe on First Amendment liberties and suffer from the same infirmities that the Court correctly sees in the expenditure ceilings. The system for public financing of Presidential campaigns is, in my judgment, an impermissible intrusion by the Government into the traditionally private political process.

More broadly, the Court's result does violence to the intent of Congress in this comprehensive scheme of campaign finance. By dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts.

Congress intended to regulate all aspects of federal campaign finances, but what remains after today's holding leaves no more than a shadow of what Congress contemplated. I question whether the residue leaves a workable program.

(1)

DISCLOSURE PROVISIONS

Disclosure is, in principle, the salutary and constitutional remedy for most of the ills Congress was seeking to alleviate. I therefore agree fully with the broad proposition that public disclosure of contributions by individuals and by entities—particularly corporations and labor unions—is an effective means of revealing the type of political support that is sometimes coupled with expectations of special favors or rewards. That disclosure impinges on First Amendment rights is conceded by the Court, *ante*, at 64–66, but given the objectives to which disclosure is directed, I agree that the need for disclosure outweighs individual constitutional claims.

Disclosure is, however, subject to First Amendment limitations which are to be defined by looking to the relevant public interests. The legitimate public interest is the elimination of the appearance and reality of corrupting influences. Serious dangers to the very processes of government justify disclosure of contributions of such dimensions reasonably thought likely to purchase special favors. These fears have been at the root of the Court's prior decisions upholding disclosure requirements, and I therefore have no disagreement, for example, with *Burroughs* v. *United States*, 290 U. S. 534 (1934).

The Court's theory, however, goes beyond permissible limits. Under the Court's view, disclosure serves broad informational purposes, enabling the public to be fully informed on matters of acute public interest. Forced disclosure of one aspect of a citizen's political activity,

under this analysis, serves the public right to know. This open-ended approach is the only plausible justification for the otherwise irrationally low ceilings of $10 and $100 for anonymous contributions. The burdens of these low ceilings seem to me obvious, and the Court does not try to question this. With commendable candor, the Court acknowledges:

> "It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute." *Ante*, at 68.

Examples come readily to mind. Rank-and-file union members or rising junior executives may now think twice before making even modest contributions to a candidate who is disfavored by the union or management hierarchy. Similarly, potential contributors may well decline to take the obvious risks entailed in making a reportable contribution to the opponent of a well-entrenched incumbent. This fact of political life did not go unnoticed by the Congress:

> "The disclosure provisions really have in fact made it difficult for challengers to challenge incumbents." 120 Cong. Rec. 34392 (1974) (remarks of Sen. Long).

See *Pollard* v. *Roberts*, 283 F. Supp. 248 (ED Ark.), aff'd *per curiam*, 393 U. S. 14 (1968).

The public right to know ought not be absolute when its exercise reveals private political convictions. Secrecy, like privacy, is not *per se* criminal. On the contrary, secrecy and privacy as to political preferences and convictions are fundamental in a free society. For example, one of the great political reforms was the advent of the secret ballot as a universal practice. Similarly, the enlightened labor legislation of our time has enshrined the secrecy of choice of a bargaining representative for

workers. In other contexts, this Court has seen to it that governmental power cannot be used to force a citizen to disclose his private affiliations, *NAACP* v. *Button*, 371 U. S. 415 (1963), even without a record reflecting any systematic harassment or retaliation, as in *Shelton* v. *Tucker*, 364 U. S. 479 (1960). For me it is far too late in the day to recognize an ill-defined "public interest" to breach the historic safeguards guaranteed by the First Amendment.

We all seem to agree that whatever the legitimate public interest in this area, proper analysis requires us to scrutinize the precise means employed to implement that interest. The balancing test used by the Court requires that fair recognition be given to competing interests. With respect, I suggest the Court has failed to give the traditional standing to some of the First Amendment values at stake here. Specifically, it has failed to confine the particular exercise of governmental power within limits reasonably required.

> "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut*, 310 U. S. 296, 304 (1940).

"Unduly" must mean not more than necessary, and until today, the Court has recognized this criterion in First Amendment cases:

> "In the area of First Amendment freedoms, government has the duty to confine itself to *the least* intrusive regulations which are adequate for the purpose." *Lamont* v. *Postmaster General*, 381 U. S. 301, 310 (1965) (BRENNAN, J., concurring). (Emphasis added.)

Similarly, the Court has said:

> "[E]ven though the governmental purpose be legiti-

> mate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker, supra,* at 488.

In light of these views,[1] it seems to me that the threshold limits fixed at $10 and $100 for anonymous contributions are constitutionally impermissible on their face. As the Court's opinion notes, *ante,* at 83, Congress gave little or no thought, one way or the other, to these limits, but rather lifted figures out of a 65-year-old statute.[2] As we are all painfully aware, the 1976 dollar is not what it used to be and is surely not the dollar of 1910. Ten dollars in 1976 will, for example, purchase only what $1.68 would buy in 1910. United States Dept. of Labor, Handbook of Labor Statistics 1975, p. 313 (Dec. 1975). To argue that a 1976 contribution of $10 or $100 entails a risk of corruption or its appearance is simply too extravagant to be maintained. No public right to know justifies the compelled disclosure of such contributions, at the risk of discouraging them. There is, in short, no relation whatever between the means used and the legitimate goal of ventilating possible undue influence. Congress has used a shotgun to kill wrens as well as hawks.

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[1] The particular verbalization has varied from case to case. First Amendment analysis defies capture in a single, easy phrase. The basic point of our inquiry, however expressed, is to determine whether the Government has sought to achieve admittedly important goals by means which demonstrably curtail our liberties to an unnecessary extent.

[2] The 1910 legislation required disclosure of the names of *recipients* of expenditures in excess of $10.

In saying that the lines drawn by Congress are "not wholly without rationality," the Court plainly fails to apply the traditional test:

> "Precision of regulation must be the touchstone in an area so closely touching on our most precious freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438 (1938).

See, *e. g.*, *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *United States* v. *Robel*, 389 U. S. 258 (1967); *Lamont* v. *Postmaster General*, *supra*. The Court's abrupt departure [3] from traditional standards is wrong; surely a greater burden rests on Congress than merely to avoid "irrationality" when regulating in the core area of the First Amendment. Even taking the Court at its word, the particular dollar amounts fixed by Congress that must be reported to the Commission fall short of meeting the test of rationality when measured by the goals sought to be achieved.

Finally, no legitimate public interest has been shown in forcing the disclosure of modest contributions that are the prime support of new, unpopular, or unfashionable political causes. There is no realistic possibility that such modest donations will have a corrupting influence especially on parties that enjoy only "minor" status. Major parties would not notice them; minor parties need them. Furthermore, as the Court candidly recognizes, *ante*, at 70, minor parties and new parties tend to be sharply ideological in character, and the public can readily discern where such parties stand, without resorting to the indirect device of recording the names of financial supporters. To hold, as the Court has, that privacy must sometimes yield to congressional investigations of alleged subversion, is quite different from making domestic po-

[3] Ironically, the Court seems to recognize this principle when dealing with the limitations on contributions. *Ante*, at 25.

litical partisans give up privacy. Cf. *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491 (1975). In any event, the dangers to First Amendment rights here are too great. Flushing out the names of supporters of minority parties will plainly have a deterrent effect on potential contributors, a consequence readily admitted by the Court, *ante*, at 71, 83, and supported by the record.[4]

I would therefore hold unconstitutional the provisions requiring reporting of contributions of more than $10 and to make a public record of the name, address, and occupation of a contributor of more than $100.

(2)

CONTRIBUTION AND EXPENDITURE LIMITS

I agree fully with that part of the Court's opinion that holds unconstitutional the limitations the Act puts on campaign expenditures which "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Ante*, at 58–59. Yet when it approves similarly stringent limitations on contributions, the Court ignores the reasons it finds so persuasive in the context of expenditures. For me contributions and expenditures are two sides of the same First Amendment coin.

By limiting campaign contributions, the Act restricts the amount of money that will be spent on political ac-

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[4] The record does not show systematic harassment of the sort involved in *NAACP* v. *Alabama*, 357 U. S. 449 (1958). But uncontradicted evidence was adduced with respect to actual experiences of minor parties indicating a sensitivity on the part of potential contributors to the prospect of disclosure. See, *e. g.*, District Court findings of fact, affidavits of Wertheimer (¶ 6) and Reed (¶ 8), 2B App. 736, 742. This evidence suffices when the governmental interest in putting the spotlight on the sources of support for minor parties or splinter groups is so tenuous.

tivity—and does so directly. Appellees argue, as the Court notes, that these limits will "act as a brake on the skyrocketing cost of political campaigns," *ante*, at 26. In treating campaign expenditure limitations, the Court says that the "First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Ante*, at 57. Limiting contributions, as a practical matter, will limit expenditures and will put an effective ceiling on the amount of political activity and debate that the Government will permit to take place. The argument that the ceiling is not, after all, very low as matters now stand gives little comfort for the future, since the Court elsewhere notes the rapid inflation in the cost of political campaigning.[5] *Ante*, at 57.

The Court attempts to separate the two communicative aspects of political contributions—the "moral" support that the gift itself conveys, which the Court suggests is the same whether the gift is $10 or $10,000,[6] and the

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[5] The Court notes that 94.9% of the funds raised by congressional candidates in 1974 came in contributions of less than $1,000, *ante*, at 26 n. 27, and suggests that the effect of the contribution limitations will be minimal. This logic ignores the disproportionate influence large contributions may have when they are made early in a campaign; "seed money" can be essential, and the inability to obtain it may effectively end some candidacies before they begin. Appellants have excerpted from the record data on nine campaigns to which large, initial contributions were critical. Brief for Appellants 132–138. Campaigns such as these will be much harder, and perhaps impossible, to mount under the Act.

[6] Whatever the effect of the limitation, it is clearly arbitrary—Congress has imposed the same ceiling on contributions to a New York or California senatorial campaign that it has put on House races in Alaska or Wyoming. Both the strength of support conveyed by the gift of $1,000 *and* the gift's potential for corruptly influencing the recipient will vary enormously from place to place. Seven Senators each spent from $1,000,000 to $1,300,000 in their successful 1974

fact that money translates into communication. The Court dismisses the effect of the limitations on the second aspect of contributions: "[T]he transformation of contributions into political debate involves speech by someone other than the contributor." *Ante*, at 21. On this premise—that contribution limitations restrict only the speech of "someone other than the contributor"—rests the Court's justification for treating contributions differently from expenditures. The premise is demonstrably flawed; the contribution limitations will, in specific instances, limit exactly the same political activity that the expenditure ceilings limit,[7] and at least one of the "ex-

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election campaigns. A great many congressional candidates spent less than $25,000. 33 Cong. Quarterly 789–790 (1975). The same contribution ceiling would seem to apply to each of these campaigns. Congress accounted for these tremendous variations when it geared the *expenditure* limits to voting population; but it imposed a flat ceiling on *contributions* without focusing on the actual evil attacked or the actual harm the restrictions will work.

[7] Suppose, for example, that a candidate's committee authorizes a celebrity or elder statesman to make a radio or television address on the candidate's behalf, for which the speaker himself plans to pay. As the Court recognizes, *ante*, at 24 n. 25, the Act defines this activity as a contribution and subjects it to the $1,000 limit on individual contributions and the $5,000 limit on contributions by political committees—effectively preventing the speech over any substantial radio or television station. Whether the speech is considered an impermissible "contribution" or an allowable "expenditure" turns, not on whether speech by "someone other than the contributor" is involved, but on whether the speech is "authorized" or not. The contribution limitations directly restrict speech by the contributor himself. Of course, this restraint can be avoided if the speaker makes his address without consulting the candidate or his agents. Elsewhere I suggest that the distinction between "independent" and "authorized" political activity is unrealistic and simply cannot be maintained. For present purposes I wish only to emphasize that the Act directly restricts, as a "contribution," what is clearly speech by the "contributor" himself.

penditure" limitations the Court finds objectionable operates precisely like the "contribution" limitations.[8]

The Court's attempt to distinguish the communication inherent in political *contributions* from the speech aspects of political *expenditures* simply "will not wash." We do little but engage in word games unless we recognize that people—candidates and contributors—spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words.

The Court attempts to make the Act seem less restrictive by casting the problem as one that goes to freedom of association rather than freedom of speech. I have long thought freedom of association and freedom of expression were two peas from the same pod. The contribution limitations of the Act impose a restriction on certain forms of associational activity that are for the most part, as the Court recognizes, *ante*, at 29, harmless in fact. And the restrictions are hardly incidental in their effect upon particular campaigns. Judges are ill-equipped to gauge the precise impact of legislation, but a law that impinges upon First Amendment rights requires us to make the attempt. It is not simply speculation to think that the limitations on contributions will foreclose some candidacies.[9] The limitations will also alter the nature of some electoral contests drastically.[10]

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[8] The Court treats the Act's provisions limiting a candidate's spending from his *personal resources* as *expenditure* limits, as indeed the Act characterizes them, and holds them unconstitutional. As MR. JUSTICE MARSHALL points out, *post*, at 287, by the Court's logic these provisions could as easily be treated as limits on *contributions*, since they limit what the candidate can give to his own campaign.

[9] Candidates who must raise large initial contributions in order to appeal for more funds to a broader audience will be handicapped. See n. 5, *supra*. It is not enough to say that the contribution ceil-

[*Footnote 10 is on p. 245*]

At any rate, the contribution limits are a far more severe restriction on First Amendment activity than the sort of "chilling" legislation for which the Court has shown such extraordinary concern in the past. See, *e. g.*, *Cohen* v. *California*, 403 U. S. 15 (1971); see also cases reviewed in *Miller* v. *California*, 413 U. S. 15 (1973); *Redrup* v. *New York*, 386 U. S. 767 (1967); *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966). If such restraints can be justified at all, they must be justified by the very strongest of state interests. With this much the Court clearly agrees; the Court even goes so far as to note that legislation cutting into these important interests must employ "means closely drawn to avoid unnecessary abridgment of associational freedoms." *Ante*, at 25.

After a bow to the "weighty interests" Congress meant to serve, the Court then forsakes this analysis in one sentence: "Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption . . . ." *Ante*, at 28. In striking down the limitations on campaign expenditures, the Court relies in part on its conclusion that other means—namely, disclosure and contribution ceilings—will adequately serve the statute's aim. It is not clear why the same analysis is not also appropriate in weighing the need for contribution ceilings in addition to disclosure requirements. Congress may well be

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ings "merely . . . require candidates . . . to raise funds from a greater number of persons," *ante*, at 22, where the limitations will effectively prevent candidates without substantial personal resources from doing just that.

[10] Under the Court's holding, candidates with personal fortunes will be free to contribute to their own campaigns as much as they like, since the Court chooses to view the Act's provisions in this regard as unconstitutional "expenditure" limitations rather than "contribution" limitations. See n. 8, *supra*.

entitled to conclude that disclosure was a "partial measure," but I had not thought until today that Congress could enact its conclusions in the First Amendment area into laws immune from the most searching review by this Court.

Finally, it seems clear to me that in approving these limitations on contributions the Court must rest upon the proposition that "pooling" money is fundamentally different from other forms of associational or joint activity. But see *ante*, at 66. I see only two possible ways in which money differs from volunteer work, endorsements, and the like. Money can be used to buy favors, because an unscrupulous politician can put it to personal use; second, giving money is a less visible form of associational activity. With respect to the first problem, the Act does not attempt to do any more than the bribery laws to combat this sort of corruption. In fact, the Act does not reach at all, and certainly the contribution limits do not reach, forms of "association" that can be fully as corrupt as a contribution intended as a *quid pro quo*—such as the eleventh-hour endorsement by a former rival, obtained for the promise of a federal appointment. This underinclusiveness is not a constitutional flaw, but it demonstrates that the contribution limits do not clearly focus on this first distinction. To the extent Congress thought that the second problem, the lesser visibility of contributions, required that money be treated differently from other forms of associational activity, disclosure laws are the simple and wholly efficacious answer; they make the invisible apparent.

(3)

PUBLIC FINANCING

I dissent from Part III sustaining the constitutionality of the public financing provisions of Subtitle H.

Since the turn of this century when the idea of Govern-

ment subsidies for political campaigns first was broached, there has been no lack of realization that the use of funds from the public treasury to subsidize political activity of private individuals would produce substantial and profound questions about the nature of our democratic society. The Majority Leader of the Senate, although supporting such legislation in 1967, said that "the implications of these questions . . . go to the very heart and structure of the Government of the Republic." [11] The Solicitor General in his *amicus curiae* brief states that "the issues involved here are of indisputable moment." [12] He goes on to express his view that public financing will have "profound effects in the way candidates approach issues and each other." [13] Public financing, he notes, "affects the role of the party in campaigns for office, changes the role of the incumbent government vis-a-vis all parties, and affects the relative strengths and strategies of candidates vis-a-vis each other and their party's leaders." [14]

The Court chooses to treat this novel public financing of political activity as simply another congressional appropriation whose validity is "necessary and proper" to Congress' power to regulate and reform elections and primaries, relying on *United States* v. *Classic,* 313 U. S 299 (1941), and *Burroughs* v. *United States,* 290 U. S. 534 (1934). No holding of this Court is directly in point, because no federal scheme allocating public funds in a comparable manner has ever been before us. The uniqueness of the plan is not relevant, of course, to whether Congress has power to enact it. Indeed, I do not question the power of Congress to regulate elections; nor do I

[11] 113 Cong. Rec. 12165 (1967).

[12] Brief for Appellee Attorney General and for United States as *Amicus Curiae* 93.

[13] *Id.,* at 94.

[14] *Id.,* at 93.

challenge the broad proposition that the General Welfare Clause is a grant, not a limitation, of power. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 420 (1819); *United States* v. *Butler*, 297 U. S. 1, 66 (1936).

I would, however, fault the Court for not adequately analyzing and meeting head on the issue whether public financial assistance to the private political activity of individual citizens and parties is a legitimate expenditure of public funds. The public monies at issue here are not being employed simply to police the integrity of the electoral process or to provide a forum for the use of all participants in the political dialogue, as would, for example, be the case if free broadcast time were granted. Rather, we are confronted with the Government's actual financing, out of general revenues, a segment of the political debate itself. As Senator Howard Baker remarked during the debate on this legislation:

> "I think there is something politically incestuous about the Government financing and, I believe, inevitably then regulating, the day-to-day procedures by which the Government is selected . . . .
>
> "I think it is extraordinarily important that the Government not control the machinery by which the public expresses the range of its desires, demands, and dissent." 120 Cong. Rec. 8202 (1974).

If this "incest" affected only the issue of the wisdom of the plan, it would be none of the concern of judges. But, in my view, the inappropriateness of subsidizing, from general revenues, the actual political dialogue of the people—the process which begets the Government itself—is as basic to our national tradition as the separation of church and state also deriving from the First Amendment, see *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971); *Walz* v. *Tax Comm'n*, 397 U. S. 664, 668–669 (1970),

or the separation of civilian and military authority, see *Orloff* v. *Willoughby*, 345 U. S. 83, 93–94 (1953), neither of which is explicit in the Constitution but both of which have developed through case-by-case adjudication of express provisions of the Constitution.

Recent history shows dangerous examples of systems with a close, "incestuous" relationship between "government" and "politics"; the Court's opinion simply dismisses possible dangers by noting that:

> "Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Ante*, at 92–93.

Congress, it reassuringly adds by way of a footnote, has expressed its determination to avoid such a possibility.[15] *Ante*, at 93 n. 126. But the Court points to no basis for predicting that the historical pattern of "varying measures of control and surveillance," *Lemon* v. *Kurtzman*, *supra*, at 621, which usually accompany grants from Government will not also follow in this case.[16] Up to now, the Court has always been extraordinarily sensitive, when dealing with First Amendment rights, to the risk that the "flag tends to follow the dollars." Yet, here, where Subtitle H specifically requires the auditing of records of political parties and candidates by Government inspectors,[17] the Court shows

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[15] Such considerations have never before influenced the Court's evaluation of the risks of restraints on expression.

[16] The Court's opinion demonstrates one such intrusion. While the Court finds that the Act's expenditure limitations unconstitutionally inhibit a candidate's or a party's First Amendment rights, it imposes, by invoking the severability clause of Subtitle H, such limitations on qualifying for public funds.

[17] See, *e. g.*, 26 U. S. C. §§ 9003, 9007, 9033, 9038 (1970 ed., Supp. IV).

little sensitivity to the danger it has so strongly condemned in other contexts. See, *e. g.*, *Everson* v. *Board of Education*, 330 U. S. 1 (1947). Up to now, this Court has scrupulously refrained, absent claims of invidious discrimination,[18] from entering the arena of intraparty disputes concerning the seating of convention delegates. *Graham* v. *Fong Eu*, 403 F. Supp. 37 (ND Cal. 1975), summarily aff'd, 423 U. S. 1067 (1976); *Cousins* v. *Wigoda*, 419 U. S. 477 (1975); *O'Brien* v. *Brown*, 409 U. S. 1 (1972). An obvious underlying basis for this reluctance is that delegate selection and the management of political conventions have been considered a strictly private political matter, not the business of Government inspectors. But once the Government finances these national conventions by the expenditure of millions of dollars from the public treasury, we may be providing a springboard for later attempts to impose a whole range of requirements on delegate selection and convention activities. Does this foreshadow judicial decisions allowing the federal courts to "monitor" these conventions to assure compliance with court orders or regulations?

Assuming, *arguendo*, that Congress could validly appropriate public money to subsidize private political activity, it has gone about the task in Subtitle H in a manner which is not, in my view, free of constitutional infirmity.[19] I do not question that Congress has "wide discretion in the manner of prescribing details of expenditures" in some contexts, *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 321 (1937). Here, however, Congress has not itself appropriated a specific sum to attain the ends of the Act but has delegated to a limited group

[18] Cf. *Terry* v. *Adams*, 345 U. S. 461 (1953); *Smith* v. *Allwright*, 321 U. S. 649 (1944).

[19] See generally remarks of Senator Gore, 112 Cong. Rec. 28783 (1966).

of citizens—those who file tax returns—the power to allocate general revenue for the Act's purposes—and of course only a small percentage of that limited group has exercised the power. There is nothing to assure that the "fund" will actually be adequate for the Act's objectives. Thus, I find it difficult to see a rational basis for concluding that this scheme would, in fact, attain the stated purposes of the Act when its own funding scheme affords no real idea of the amount of the available funding.

I agree with MR. JUSTICE REHNQUIST that the scheme approved by the Court today invidiously discriminates against minor parties. Assuming, *arguendo*, the constitutionality of the overall scheme, there is a legitimate governmental interest in requiring a group to make a "preliminary showing of a significant modicum of support." *Jenness* v. *Fortson*, 403 U. S. 431, 442 (1971). But the present system could preclude or severely hamper access to funds before a given election by a group or an individual who might, at the time of the election, reflect the views of a major segment or even a majority of the electorate. The fact that there have been few drastic realignments in our basic two-party structure in 200 years is no constitutional justification for freezing the status quo of the present major parties at the expense of such future political movements. Cf. discussion, *ante*, at 73. When and if some minority party achieves majority status, Congress can readily deal with any problems that arise. In short, I see grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates. This Court has, until today, been particularly cautious when dealing with enactments that tend to perpetuate those who control legislative power. See *Reynolds* v. *Sims*, 377 U. S. 533, 570 (1964).

I would also find unconstitutional the system of

matching grants which makes a candidate's ability to amass private funds the sole criterion for eligibility for public funds. Such an arrangement can put at serious disadvantage a candidate with a potentially large, widely diffused—but poor—constituency. The ability of a candidate's supporters to help pay for his campaign cannot be equated with their willingness to cast a ballot for him. See *Lubin* v. *Panish*, 415 U. S. 709 (1974); *Bullock* v. *Carter*, 405 U. S. 134 (1972).

(4)

I cannot join in the attempt to determine which parts of the Act can survive review here. The statute as it now stands is unworkable and inequitable.

I agree with the Court's holding that the Act's restrictions on expenditures made "relative to a clearly identified candidate," independent of any candidate or his committee, are unconstitutional. *Ante*, at 39–51. Paradoxically the Court upholds the limitations on individual contributions, which embrace precisely the same sort of expenditures "relative to a clearly identified candidate" if those expenditures are "authorized or requested" by the "candidate or his agents." *Ante*, at 24 n. 25. The Act as cut back by the Court thus places intolerable pressure on the distinction between "authorized" and "unauthorized" expenditures on behalf of a candidate; even those with the most sanguine hopes for the Act might well concede that the distinction cannot be maintained. As the Senate Report on the bill said:

> "Whether campaigns are funded privately or publicly . . . controls are imperative if Congress is to enact meaningful limits on direct contributions. Otherwise, wealthy individuals limited to a $3,000 direct contribution [$1,000 in the bill as finally enacted] could also purchase one hundred thousand

> dollars' worth of advertisements for a favored candidate. Such a loophole would render direct contribution limits virtually meaningless." S. Rep. No. 93–689, p. 18 (1974).

Given the unfortunate record of past attempts to draw distinctions of this kind, see *ante,* at 61–62, it is not too much to predict that the Court's holding will invite avoidance, if not evasion, of the intent of the Act, with "independent" committees undertaking "unauthorized" activities in order to escape the limits on contributions. The Court's effort to blend First Amendment principles and practical politics has produced a strange offspring.

Moreover, the Act—or so much as the Court leaves standing—creates significant inequities. A candidate with substantial personal resources is now given by the Court a clear advantage over his less affluent opponents, who are constrained by law in fundraising, because the Court holds that the "First Amendment cannot tolerate" any restrictions on spending. *Ante,* at 59. Minority parties, whose situation is difficult enough under an Act that excludes them from public funding, are prevented from accepting large single-donor contributions. At the same time the Court sustains the provision aimed at broadening the base of political support by requiring candidates to seek a greater number of small contributors, it sustains the unrealistic disclosure thresholds of $10 and $100 that I believe will deter those hoped-for small contributions. Minor parties must now compete for votes against two major parties whose expenditures will be vast. Finally, the Act's distinction between contributions in money and contributions in services remains, with only the former being subject to any limits. As Judge Tamm put it in dissent from the Court of Appeals' opinion:

> "[T]he classification created only regulates certain

> types of disproportional influences. Under section 591 (e)(5), services are excluded from contributions. This allows the housewife to volunteer time that might cost well over $1000 to hire on the open market, while limiting her neighbor who works full-time to a regulated contribution. It enhances the disproportional influence of groups who command large quantities of these volunteer services and will continue to magnify this inequity by not allowing for an inflation adjustment to the contribution limit. It leads to the absurd result that a lawyer's contribution of services to aid a candidate in complying with FECA is exempt, but his first amendment activity is regulated if he falls ill and hires a replacement." 171 U. S. App. D. C. 172, 266, 519 F. 2d 821, 915 (1975).

One need not call problems of this order equal protection violations to recognize that the contribution limitations of the Act create grave inequities that are aggravated by the Court's interpretation of the Act.

The Court's piecemeal approach fails to give adequate consideration to the integrated nature of this legislation. A serious question is raised, which the Court does not consider:[20] when central segments, key operative provisions, of this Act are stricken, can what remains function in anything like the way Congress intended? The incongruities are obvious. The Commission is now eliminated, yet its very purpose was to guide candidates and campaign workers—and their accountants and lawyers—through an intricate statutory maze where a misstep can lead to imprisonment. All candidates can now spend freely; affluent candidates, after today, can spend their own money without limit; yet, contributions for the ordi-

[20] The problem is considered only in the limited context of Subtitle H.

nary candidate are severely restricted in amount—and small contributors are deterred. I cannot believe that Congress would have enacted a statutory scheme containing such incongruous and inequitable provisions.

Although the statute contains a severability clause, 2 U. S. C. § 454 (1970 ed., Supp. IV), such a clause is not an "inexorable command." [21] *Dorchy* v. *Kansas*, 264 U. S. 286, 290 (1924). The clause creates a rebuttable presumption that " 'eliminating invalid parts, the legislature would have been satisfied with what remained.' " *Welsh* v. *United States*, 398 U. S. 333, 364 (1970) (Harlan, J., concurring, quoting from *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 235 (1932)). Here just as the presumption of constitutionality of a statute has been overcome to the point that major proportions and chapters of the Act have been declared unconstitutional, for me the presumption of severability has been rebutted. To invoke a severability clause to salvage parts of a comprehensive, integrated statutory scheme, which parts, standing alone, are unworkable and in many aspects unfair, exalts a formula at the expense of the broad objectives of Congress.

Finally, I agree with the Court that the members of the Federal Election Commission were unconstitutionally appointed. However, I disagree that we should give blanket *de facto* validation to all actions of the Commission undertaken until today. The issue is not before us and we cannot know what acts we are ratifying. I would leave this issue to the District Court to resolve if and when any challenges are brought.

In the past two decades the Court has frequently

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[21] Section 454 provides that if a "provision" is invalid, the entire Act will not be deemed invalid. More than a provision, more than a few provisions, have been held invalid today. Section 454 probably does not even reach such extensive invalidation.

spoken of the broad coverage of the First Amendment, especially in the area of political dialogue:

> "[T]o assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth* v. *United States*, 354 U. S. 476, 484 (1957);

and:

> "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . [including] discussions of candidates . . . ," *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966);

and again:

> "[I]t can hardly be doubted that the constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971).

To accept this generalization one need not agree that the Amendment has its "fullest and most urgent application" only in the political area, for others would think religious freedom is on the same or even a higher plane. But I doubt that the Court would tolerate for an instant a limitation on contributions to a church or other religious cause; however grave an "evil" Congress thought the limits would cure, limits on religious expenditures would most certainly fall as well. To limit either contributions or expenditures as to churches would plainly restrict "the free exercise" of religion. In my view Congress can no more ration political expression than it can ration religious expression; and limits on political or religious contributions and expenditures effectively curb expression in both areas. There are many prices we pay for the freedoms secured by the First Amendment; the risk of undue

influence is one of them, confirming what we have long known: Freedom is hazardous, but some restraints are worse.

MR. JUSTICE WHITE, concurring in part and dissenting in part.

I concur in the Court's answers to certified questions 1, 2, 3 (b), 3 (c), 3 (e), 3 (f), 3 (h), 5, 6, 7 (a), 7 (b), 7 (c), 7 (d), 8 (a), 8 (b), 8 (c), 8 (d), 8 (e), and 8 (f). I dissent from the answers to certified questions 3 (a), 3 (d), and 4 (a). I also join in Part III of the Court's opinion and in much of Parts I–B, II, and IV.

I

It is accepted that Congress has power under the Constitution to regulate the election of federal officers, including the President and the Vice President. This includes the authority to protect the elective processes against the "two great natural and historical enemies of all republics, open violence and insidious corruption," *Ex parte Yarbrough*, 110 U. S. 651, 658 (1884); for "[i]f this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption," the latter being the consequence of "the free use of money in elections, arising from the vast growth of recent wealth . . . ." *Id.*, at 657–658, 667.

This teaching from the last century was quoted at length and reinforced in *Burroughs* v. *United States*, 290 U. S. 534, 546–548 (1934). In that case the Court sustained the Federal Corrupt Practices Act of 1925, Title III of the Act of Feb. 28, 1925, 43 Stat. 1070, which, among other things, required political committees to keep

records and file reports concerning all contributions and expenditures received and made by political committees for the purposes of influencing the election of candidates for federal office. The Court noted the conclusion of Congress that public disclosure of contributions would tend to prevent the corrupt use of money to influence elections; this, together with the requirement "that the treasurer's statement shall include full particulars in respect of expenditures," made it "plain that the statute as a whole is calculated to discourage the making and use of contributions for purposes of corruption." 290 U. S., at 548. Congress clearly had the power to further as it did that fundamental goal:

> "The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *Id.*, at 547–548.

Pursuant to this undoubted power of Congress to vindicate the strong public interest in controlling corruption and other undesirable uses of money in connection with election campaigns, the Federal Election Campaign Act substantially broadened the reporting and disclosure requirements that so long have been a part of the federal law. Congress also concluded that limitations on contributions and expenditures were essential if the aims of the Act were to be achieved fully. In another major innovation, aimed at insulating candidates from the time-consuming and entangling task of raising huge sums of

money, provision was made for public financing of political campaigns for federal office. A Federal Election Commission (FEC) was also created to administer the law.

The disclosure requirements and the limitations on contributions and expenditures are challenged as invalid abridgments of the right of free speech protected by the First Amendment. I would reject these challenges. I agree with the Court's conclusion and much of its opinion with respect to sustaining the disclosure provisions. I am also in agreement with the Court's judgment upholding the limitations on contributions. I dissent, however, from the Court's view that the expenditure limitations of 18 U. S. C. §§ 608 (c) and (e) (1970 ed., Supp. IV) violate the First Amendment.

Concededly, neither the limitations on contributions nor those on expenditures directly or indirectly purport to control the content of political speech by candidates or by their supporters or detractors. What the Act regulates is giving and spending money, acts that have First Amendment significance not because they are themselves communicative with respect to the qualifications of the candidate, but because money may be used to defray the expenses of speaking or otherwise communicating about the merits or demerits of federal candidates for election. The act of giving money to political candidates, however, may have illegal or other undesirable consequences: it may be used to secure the express or tacit understanding that the giver will enjoy political favor if the candidate is elected. Both Congress and this Court's cases have recognized this as a mortal danger against which effective preventive and curative steps must be taken.

Since the contribution and expenditure limitations are neutral as to the content of speech and are not motivated by fear of the consequences of the political speech

of particular candidates or of political speech in general, this case depends on whether the nonspeech interests of the Federal Government in regulating the use of money in political campaigns are sufficiently urgent to justify the incidental effects that the limitations visit upon the First Amendment interests of candidates and their supporters.

Despite its seeming struggle with the standard by which to judge this case, this is essentially the question the Court asks and answers in the affirmative with respect to the limitations on contributions which individuals and political committees are permitted to make to federal candidates. In the interest of preventing undue influence that large contributors would have or that the public might think they would have, the Court upholds the provision that an individual may not give to a candidate, or spend on his behalf if requested or authorized by the candidate to do so, more than $1,000 in any one election. This limitation is valid although it imposes a low ceiling on what individuals may deem to be their most effective means of supporting or speaking on behalf of the candidate—*i. e.*, financial support given directly to the candidate. The Court thus accepts the congressional judgment that the evils of unlimited contributions are sufficiently threatening to warrant restriction regardless of the impact of the limits on the contributor's opportunity for effective speech and in turn on the total volume of the candidate's political communications by reason of his inability to accept large sums from those willing to give.

The congressional judgment, which I would also accept, was that other steps must be taken to counter the corrosive effects of money in federal election campaigns. One of these steps is § 608 (e), which, aside from those funds that are given to the candidate or spent at his

request or with his approval or cooperation, limits what a contributor may independently spend in support or denigration of one running for federal office. Congress was plainly of the view that these expenditures also have corruptive potential; but the Court strikes down the provision, strangely enough claiming more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed this bill and the President who signed it. Those supporting the bill undeniably included many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years.

It would make little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to limit the amounts that could be spent on his behalf. Yet the Court permits the former while striking down the latter limitation. No more than $1,000 may be given to a candidate or spent at his request or with his approval or cooperation; but otherwise, apparently, a contributor is to be constitutionally protected in spending unlimited amounts of money in support of his chosen candidate or candidates.

Let us suppose that each of two brothers spends $1 million on TV spot announcements that he has individually prepared and in which he appears, urging the election of the same named candidate in identical words. One brother has sought and obtained the approval of the candidate; the other has not. The former may validly be prosecuted under § 608 (e); under the Court's view, the latter may not, even though the candidate could scarcely help knowing about and appreciating the expensive favor. For constitutional purposes it is difficult to see the difference between the two situations. I would take the word of those who know—that limiting

independent expenditures is essential to prevent transparent and widespread evasion of the contribution limits.

In sustaining the contribution limits, the Court recognizes the importance of avoiding public misapprehension about a candidate's reliance on large contributions. It ignores that consideration in invalidating § 608 (e). In like fashion, it says that Congress was entitled to determine that the criminal provisions against bribery and corruption, together with the disclosure provisions, would not in themselves be adequate to combat the evil and that limits on contributions should be provided. Here, the Court rejects the identical kind of judgment made by Congress as to the need for and utility of expenditure limits. I would not do so.

The Court also rejects Congress' judgment manifested in § 608 (c) that the federal interest in limiting total campaign expenditures by individual candidates justifies the incidental effect on their opportunity for effective political speech. I disagree both with the Court's assessment of the impact on speech and with its narrow view of the values the limitations will serve.

Proceeding from the maxim that "money talks," the Court finds that the expenditure limitations will seriously curtail political expression by candidates and interfere substantially with their chances for election. The Court concludes that the Constitution denies Congress the power to limit campaign expenses; federal candidates—and I would suppose state candidates, too—are to have the constitutional right to raise and spend unlimited amounts of money in quest of their own election.

As an initial matter, the argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much. Compulsory bargaining and the right to strike, both provided for or protected by federal law, inevitably have

increased the labor costs of those who publish newspapers, which are in turn an important factor in the recent disappearance of many daily papers. Federal and state taxation directly removes from company coffers large amounts of money that might be spent on larger and better newspapers. The antitrust laws are aimed at preventing monopoly profits and price fixing, which gouge the consumer. It is also true that general price controls have from time to time existed and have been applied to the newspapers or other media. But it has not been suggested, nor could it be successfully, that these laws, and many others, are invalid because they siphon off or prevent the accumulation of large sums that would otherwise be available for communicative activities.

In any event, as it should be unnecessary to point out, money is not always equivalent to or used for speech, even in the context of political campaigns. I accept the reality that communicating with potential voters is the heart of an election campaign and that widespread communication has become very expensive. There are, however, many expensive campaign activities that are not themselves communicative or remotely related to speech. Furthermore, campaigns differ among themselves. Some seem to spend much less money than others and yet communicate as much as or more than those supported by enormous bureaucracies with unlimited financing. The record before us no more supports the conclusion that the communicative efforts of congressional and Presidential candidates will be crippled by the expenditure limitations than it supports the contrary. The judgment of Congress was that reasonably effective campaigns could be conducted within the limits established by the Act and that the communicative efforts of these campaigns would not seriously suffer. In this posture

of the case, there is no sound basis for invalidating the expenditure limitations, so long as the purposes they serve are legitimate and sufficiently substantial, which in my view they are.

In the first place, expenditure ceilings reinforce the contribution limits and help eradicate the hazard of corruption. The Court upholds the overall limit of $25,000 on an individual's political contributions in a single election year on the ground that it helps reinforce the limits on gifts to a single candidate. By the same token, the expenditure limit imposed on candidates plays its own role in lessening the chance that the contribution ceiling will be violated. Without limits on total expenditures, campaign costs will inevitably and endlessly escalate. Pressure to raise funds will constantly build and with it the temptation to resort in "emergencies" to those sources of large sums, who, history shows, are sufficiently confident of not being caught to risk flouting contribution limits. Congress would save the candidate from this predicament by establishing a reasonable ceiling on all candidates. This is a major consideration in favor of the limitation. It should be added that many successful candidates will also be saved from large, overhanging campaign debts which must be paid off with money raised while holding public office and at a time when they are already preparing or thinking about the next campaign. The danger to the public interest in such situations is self-evident.

Besides backing up the contribution provisions, which are aimed at preventing untoward influence on candidates that are elected, expenditure limits have their own potential for preventing the corruption of federal elections themselves. For many years the law has required the disclosure of expenditures as well as contributions. As *Burroughs* indicates, the corrupt use of money by candi-

dates is as much to be feared as the corrosive influence of large contributions. There are many illegal ways of spending money to influence elections. One would be blind to history to deny that unlimited money tempts people to spend it on *whatever* money can buy to influence an election. On the assumption that financing illegal activities is low on the campaign organization's priority list, the expenditure limits could play a substantial role in preventing unethical practices. There just would not be enough of "that kind of money" to go around.

I have little doubt in addition that limiting the total that can be spent will ease the candidate's understandable obsession with fundraising, and so free him and his staff to communicate in more places and ways unconnected with the fundraising function. There is nothing objectionable—indeed it seems to me a weighty interest in favor of the provision—in the attempt to insulate the political expression of federal candidates from the influence inevitably exerted by the endless job of raising increasingly large sums of money. I regret that the Court has returned them all to the treadmill.

It is also important to restore and maintain public confidence in federal elections. It is critical to obviate or dispel the impression that federal elections are purely and simply a function of money, that federal offices are bought and sold or that political races are reserved for those who have the facility—and the stomach—for doing whatever it takes to bring together those interests, groups, and individuals that can raise or contribute large fortunes in order to prevail at the polls.

The ceiling on candidate expenditures represents the considered judgment of Congress that elections are to be decided among candidates none of whom has overpowering advantage by reason of a huge campaign war chest. At least so long as the ceiling placed upon the candidates

is not plainly too low, elections are not to turn on the difference in the amounts of money that candidates have to spend. This seems an acceptable purpose and the means chosen a commonsense way to achieve it. The Court nevertheless holds that a candidate has a constitutional right to spend unlimited amounts of money, mostly that of other people, in order to be elected. The holding perhaps is not that federal candidates have the constitutional right to purchase their election, but many will so interpret the Court's conclusion in this case. I cannot join the Court in this respect.

I also disagree with the Court's judgment that § 608 (a), which limits the amount of money that a candidate or his family may spend on his campaign, violates the Constitution. Although it is true that this provision does not promote any interest in preventing the corruption of candidates, the provision does, nevertheless, serve salutary purposes related to the integrity of federal campaigns. By limiting the importance of personal wealth, § 608 (a) helps to assure that only individuals with a modicum of support from others will be viable candidates. This in turn would tend to discourage any notion that the outcome of elections is primarily a function of money. Similarly, § 608 (a) tends to equalize access to the political arena, encouraging the less wealthy, unable to bankroll their own campaigns, to run for political office.

As with the campaign expenditure limits, Congress was entitled to determine that personal wealth ought to play a less important role in political campaigns than it has in the past. Nothing in the First Amendment stands in the way of that determination.

For these reasons I respectfully dissent from the Court's answers to certified questions 3 (a), 3 (d), and 4 (a).

II

I join the answers in Part IV of the Court's opinion, *ante*, at 141–142, n. 177, to the questions certified by the District Court relating to the composition and powers of the FEC, *i. e.*, questions 8 (a), 8 (b), 8 (c), 8 (d) (with the qualifications stated *infra*, at 282–286), 8 (e), and 8 (f). I also agree with much of that part of the Court's opinion, including the conclusions that these questions are properly before us and ripe for decision, that the FEC's past acts are *de facto* valid, that the Court's judgment should be stayed, and that the FEC may function *de facto* while the stay is in effect.

The answers to the questions turn on whether the FEC is illegally constituted because its members were not selected in the manner required by Art. II, § 2, cl. 2, the Appointments Clause. It is my view that with one exception Congress could endow a properly constituted commission with the powers and duties it has given the FEC.[1]

Section 437c creates an eight-member FEC. Two members, the Secretary of the Senate and the Clerk of the House of Representatives, are *ex officio* members

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[1] That is, if the FEC were properly constituted, I would answer questions 8 (b), 8 (c), 8 (d) (see *infra*, at 282–286), and 8 (f) in the negative. With respect to question 8 (e), I reserve judgment on the validity of 2 U. S. C. § 456 (1970 ed., Supp. IV) which empowers the FEC to disqualify a candidate for failure to file certain reports. Of course, to the extent that the Court invalidates the expenditure limitations of the FECA, Part I–C, *ante*, at 39–59, the FEC, however appointed, would be powerless to enforce those provisions.

Unless otherwise indicated, all statutory citations in this part of the opinion are to the Federal Election Campaign Act of 1971, §§ 301–311, 86 Stat. 11, as amended by the Federal Election Campaign Act Amendments of 1974, §§ 201–407, 88 Stat. 1272, 2 U. S. C. § 431 *et seq.* (1970 ed., Supp. IV).

without the right to vote or to hold an FEC office.[2] Of the remaining six, two are appointed by the President *pro tempore* of the Senate upon the recommendation of the majority and minority leaders of that body; two are similarly appointed by the Speaker of the House; and two are appointed by the President of the United States. The appointment of each of these six members is subject to confirmation by a majority of both Houses of Congress. § 437c (a)(1). Each member is appointed for a term of years; none can be an elected or appointed officer or employee of any branch of the Government at the time of his appointment. §§ 437c (a)(2), (3). The FEC is empowered to elect its own officers, § 437c (a)(5), and to appoint a staff director and general counsel. § 437c (f). Decisions are by a majority vote. § 437c (c).

It is apparent that none of the members of the FEC is selected in a manner Art. II specifies for the appointment of officers of the United States. The Appointments Clause provides:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[3]

Although two of the members of the FEC are initially selected by the President, his nominations are subject to confirmation by both Houses of Congress. Neither

[2] References to the "Commissioners," the "FEC," or its "members" do not include these two *ex officio* members.

[3] U. S. Const., Art. II, § 2, cl. 2.

he, the head of any department, nor the Judiciary has any voice in the selection of the remaining members of the FEC. The challenge to the FEC, therefore, is that its members are officers of the United States the mode of whose appointment was required to, but did not, conform to the Appointments Clause. That challenge is well taken.

The Appointments Clause applies only to officers of the United States whose appointment is not "otherwise provided for" in the Constitution. Senators and Congressmen are officers of the United States, but the Constitution expressly provides the mode of their selection.[4] The Constitution also expressly provides that each House of Congress is to appoint its own officers.[5] But it is not contended here that FEC members are officers of either House selected pursuant to these express provisions, if for no other reason, perhaps, than that none of the Commissioners was selected in the manner specified by these provisions—none of them was finally selected by either House acting alone as Art. I authorizes.

The appointment power provided in Art. II also applies only to officers, as distinguished from employees,[6] of the United States, but there is no claim the Commissioners are employees of the United States rather than officers. That the Commissioners are among those officers of the United States referred to in the Appointments Clause of Art. II is evident from the breadth of their

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[4] *Id.*, Art. I, §§ 2, 3, and the Seventeenth Amendment.

[5] "The House of Representatives shall chuse their Speaker and other Officers . . . ." U. S. Const., Art. I, § 2, cl. 5.

"The Vice President of the United States shall be President of the Senate, but . . . [t]he Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States." § 3, cls. 4, 5.

[6] The distinction appears *ante*, at 126 n. 162.

assigned duties and the nature and importance of their assigned functions.

The functions and duties of the FEC relate to three different aspects of the election laws: First, the provisions of the Criminal Code, 18 U. S. C. §§ 608–617 (1970 ed., Supp. IV), which establish major substantive limitations on political contributions and expenditures by individuals, political organizations, and candidates; second, the reporting and disclosure provisions contained in 2 U. S. C. §§ 431–437b (1970 ed., Supp. IV), these sections requiring the filing of detailed reports of political contributions and expenditures; and third, the provisions of 26 U. S. C. §§ 9001–9042 (1970 ed., Supp. IV) with respect to the public financing of Presidential primary and general election campaigns. From the "representative examples of [the FEC s] various powers" the Court describes, *ante*, at 109–113, it is plain that the FEC is the primary agency for the enforcement and administration of major parts of the election laws. It does not replace or control the executive agencies with respect to criminal prosecutions, but within the wide zone of its authority the FEC is independent of executive as well as congressional control except insofar as certain of its regulations must be laid before and not be disapproved by Congress. § 438 (c); 26 U. S. C. §§ 9009 (c), 9039 (c) (1970 ed., Supp. IV). With duties and functions such as these, members of the FEC are plainly "officers of the United States" as that term is used in Art. II, § 2, cl. 2.

It is thus not surprising that the FEC, in defending the legality of its members' appointments, does not deny that they are "officers of the United States" as that term is used in the Appointments Clause of Art. II.[7] Instead,

[7] Indeed the FEC attacks as "erroneous" appellants' statement that the Court of Appeals ruled that "the FEC commissioners are

for reasons the Court outlines, *ante*, at 131–132, 133–134, its position appears to be that even if its members are officers of the United States, Congress may nevertheless appoint a majority of the FEC without participation by the President.[8] This position that Congress may itself appoint the members of a body that is to administer a wide-ranging statute will not withstand examination in light of either the purpose and history of the Appointments Clause or of prior cases in this Court.

The language of the Appointments Clause was not mere inadvertence. The matter of the appointment of officers of the new Federal Government was repeatedly debated by the Framers, and the final formulation of the Clause arrived at only after the most careful debate and consideration of its place in the overall design of government. The appointment power was a major building block fitted into the constitutional structure designed to avoid the accumulation or exercise of arbitrary power by the Federal Government. The basic approach was that official power should be divided among the Executive, Legislative, and Judicial Departments. The separation-of-powers principle was implemented by a series of provisions, among which was the knowing decision that Congress was to have no power whatsoever to appoint federal officers, except for the power of each House to appoint its own officers serving in the strictly legislative

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not officers of the United States. Rather, it held that the grant of power to the President to appoint civil officers of the United States is not to be read as preclusive of Congressional authority to appoint such officers to aid in the discharge of Congressional responsibilities." Brief for Appellee Federal Election Commission 16 n. 19 (hereafter FEC Brief).

[8] How Congress may both appoint officers itself and condition appointment of the President's nominees on confirmation by a majority of both Houses of Congress is not explained.

processes and for the confirming power of the Senate alone.

The decision to give the President the exclusive power to initiate appointments was thoughtful and deliberate. The Framers were attempting to structure three departments of government so that each would have affirmative powers strong enough to resist the encroachment of the others. A fundamental tenet was that the same persons should not both legislate and administer the laws.[9] From the very outset, provision was made to prohibit members of Congress from holding office in another branch of the Government while also serving in Congress. There was little if any dispute about this incompatibility provision which survived in Art. I, § 6, of the Constitution as finally ratified.[10] Today, no person may serve in Congress and at the same time be Attorney General, Secretary of State, a member of the judiciary, a United States attorney, or a member of the Federal Trade Commission or the National Labor Relations Board.

Early in the 1787 Convention it was also proposed that members of Congress be absolutely ineligible during the term for which they were elected, and for a period thereafter, for appointment to any state or federal office.[11] But to meet substantial opposition to so stringent a provision, ineligibility for state office was first eliminated,[12] and under the language ultimately adopted, Congressmen

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[9] Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983, 1042–1043 (1975).

[10] U. S. Const., Art. I, § 6, cl. 2, provides in part:

"[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

See 1 M. Farrand, The Records of the Federal Convention of 1787, pp. 379–382 (1911) (hereafter Farrand); 2 Farrand 483.

[11] 1 Farrand 20.

[12] *Id.*, at 210–211, 217, 219, 221, 222, 370, 375–377, 379–382, 383, 384, 419, 429, 435; 2 Farrand 180.

were disqualified from being appointed only to those offices which were created, or for which the emoluments were increased, during their term of office.[13] Offices not in this category could be filled by Representatives or Senators, but only upon resignation.

Immediately upon settling the ineligibility provision, the Framers returned to the appointment power which they had several times before debated and postponed for later consideration.[14] From the outset, there had been no dispute that the Executive alone should appoint, and not merely nominate, purely executive officers,[15] but at one stage judicial officers were to be selected by the entire Congress.[16] This provision was subsequently changed to lodge the power to choose judges in the Senate,[17] which was later also given the power to appoint ambassadors and other public ministers.[18] But following resolution of the dispute over the ineligibility provision, which served both to prevent members of Congress from appointing themselves to federal office and to limit their being appointed to federal office, it was determined that the appointment of all principal officers, whether executive or not, should originate with the President and that the Senate should have only the power of advice and consent.[19] Inferior officers

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[13] *Id.*, at 487. As ratified, the Ineligibility Clause provides: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time . . . ." U. S. Const., Art. I, § 6, cl. 2.

[14] 1 Farrand 116, 120, 224, 233; 2 Farrand 37–38, 41–44, 71–72, 116, 138.

[15] 1 Farrand 63, 67.

[16] *Id.*, at 21–22.

[17] *Id.*, at 224, 233.

[18] 2 Farrand 183, 383, 394.

[19] *Id.*, at 533.

could be otherwise appointed, but not by Congress itself.[20] This allocation of the appointment power, in which for the first time the Executive had the power to initiate appointment to all principal offices and the Senate was empowered to advise and consent to nominations by the Executive,[21] was made possible by adoption of the ineligibility provisions and was formulated as part of the fundamental compromises with respect to the composition of the Senate, the respective roles of the House and Senate, and the placement of the election of the President in the electoral college.

Under Art. II as finally adopted, law enforcement authority was not to be lodged in elected legislative officials subject to political pressures. Neither was the Legislative Branch to have the power to appoint those who were to enforce and administer the law. Also, the appointment power denied Congress and vested in the President was not limited to purely executive officers but reached officers performing purely judicial functions as well as all other officers of the United States.

I thus find singularly unpersuasive the proposition that because the FEC is implementing statutory policies with respect to the conduct of elections, which policies Congress has the power to propound, its members may be appointed by Congress. One might as well argue that the exclusive and plenary power of Congress over interstate commerce authorizes Congress to appoint the members of the Interstate Commerce Commission and of many other regulatory commissions; that its exclusive power to provide for patents and copyrights would permit the administration of the patent laws to be carried out by a congressional committee; or that the exclusive power of the Federal Government to establish post offices au-

[20] *Id.*, at 627.

[21] C. Warren, The Making of the Constitution 641–642 (1947).

thorizes Congress itself or the Speaker of the House and the President *pro tempore* of the Senate to appoint postmasters and to enforce the postal laws.

Congress clearly has the power to create federal offices and to define the powers and duties of those offices, *Myers* v. *United States,* 272 U. S. 52, 128–129 (1926), but no case in this Court even remotely supports the power of Congress to appoint an officer of the United States aside from those officers each House is authorized by Art. I to appoint to assist in the legislative processes.

In *Myers,* a postmaster of the first class was removed by the President prior to the expiration of his statutory four-year term. Challenging the President's power to remove him contrary to the statute, he sued for his salary. The challenge was rejected here. The Court said that under the Constitution the power to appoint the principal officers of the Executive Branch was an inherent power of the President:

> "[T]he reasonable implication, even in the absence of express words, was that as part of his executive power [the President] should select those who were to act for him under his direction in the execution of the laws." *Id.,* at 117.

Further, absent express limitation in the Constitution, the President was to have unrestricted power to remove those administrative officers essential to him in discharging his duties. These fundamental rules were to extend to those bureau and department officers with power to issue regulations and to discharge duties of a quasi-judicial nature—those members of "executive tribunals whose decisions after hearing affect interests of individuals." *Id.,* at 135. As for inferior officers such as the plaintiff postmaster, the same principles were to govern if Congress chose to place the appointment in the President with the advice and consent of the Senate, as

was the case in *Myers*. Under the Appointments Clause, Congress could—but did not in the *Myers* case—permit the appointment of inferior officers by the heads of departments, in which event, the Court said, Congress would have the authority to establish a term of office and limit the reasons for their removal. But in no circumstance could Congress participate in the removal:

> "[T]he Court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers." *Id.*, at 161.

Humphrey's Executor v. *United States*, 295 U. S. 602 (1935), limited the reach of the *Myers* case. There the President attempted to remove a member of the Federal Trade Commission prior to the expiration of his statutory term and for reasons not specified in the statute. The Court ruled that the Presidential removal power vindicated in *Myers* related solely to "purely executive officers," 295 U. S., at 628, from whom the Court sharply distinguished officers such as the members of the Federal Trade Commission who were to be free from political dominance and control, whose duties are "neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Id.*, at 624. Contrary to the dicta in *Myers*, such an officer was thought to occupy "no place in the executive department," to exercise "no part of the executive power vested by the Constitution in the President," 295 U. S., at 628, and to be immune from removal by the President except on terms specified by Congress. The Commissioners were described as being

in part an administrative body carrying out legislative policies and in part an agency of the Judiciary, *ibid.;* such a body was intended to be "independent of executive authority, *except in its selection,* and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Id.,* at 625–626. (Emphasis in original.)

The holding in *Humphrey's Executor* was confirmed in *Wiener* v. *United States,* 357 U. S. 349 (1958), but the Court did not question what *Humphrey's Executor* had expressly recognized—that members of independent agencies are not independent of the Executive with respect to their appointments. Nor did either *Wiener* or *Humphrey's Executor* suggest that Congress could not only create the independent agency, specify its duties, and control the grounds for removal of its members but could also *itself* appoint or remove them without the participation of the Executive Branch of the Government. To have so held would have been contrary to the Appointments Clause as the *Myers* case recognized.

It is said that historically Congress has used its own officers to receive and file the reports of campaign expenditures and contributions as required by law and that this Court should not interfere with this practice. But the Act before us creates a separate and independent campaign commission with members, some nominated by the President, who have specified terms of office, are not subject to removal by Congress, and are free from congressional control in their day-to-day functions. The FEC, it is true, is the designated authority with which candidates and political committees must file reports of contributions and expenditures, as required by the Act. But the FEC may also make rules and regulations with respect to the disclosure requirements, may investigate reported violations, issue subpoenas, hold its own hear-

ings and institute civil enforcement proceedings in its own name. Absent a request by the FEC, it would appear that the Attorney General has no role in the civil enforcement of the reporting and disclosure requirements. The FEC may also issue advisory opinions with respect to the legality of any particular activities so as to protect those persons who in good faith have conducted themselves in reliance on the FEC's opinion. These functions go far beyond mere information gathering, and there is no long history of lodging such enforcement powers in congressional appointees.

Nor do the FEC's functions stop with policing the reporting and disclosure requirements of the Act. The FEC is given express power to administer, obtain compliance with, and "to formulate general policy" [22] with respect to 18 U. S. C. §§ 608–617, so much so that the Act expressly provides that "[t]he Commission has primary jurisdiction with respect to the civil enforcement of such provisions." [23] Following its own proceedings the FEC may request the Attorney General to bring civil enforcement proceedings, a request which the Attorney General must honor.[24] And good-faith conduct taken in accord-

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[22] § 437d (a)(9).

[23] § 437c (b).

[24] Section 437g (a)(7) provides:

"Whenever in the judgment of the Commission, after affording due notice and an opportunity for a hearing, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any [relevant] provision . . . upon request by the Commission the Attorney General on behalf of the United States *shall* institute a civil action for relief . . . ." (Emphasis supplied.)

The FEC argues that "'there is no showing in this case of a convincing legislative history that would enable us to conclude that "shall" was intended to be the "language of command."'" FEC Brief 62 n. 52, quoting 171 U. S. App. D. C. 172, 244 n. 191, 519

ance with the FEC's advisory opinions as to whether any transaction or activity would violate any of these criminal provisions "shall be presumed to be in compliance with" these sections.[25] § 437f (b). Finally, the FEC has the central role in administering and enforcing the provisions

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F. 2d 821, 893 n. 191 (1975). The contention is that the FEC's enforcement power is not exclusive, because the Attorney General retains the traditional discretion to decline to institute legal proceedings. However this may be, the FEC's civil enforcement responsibilities are substantial. Moreover it is authorized under 26 U. S. C. §§ 9010, 9040 (1970 ed., Supp. IV), to appear in and to defend actions brought in the Court of Appeals for the District of Columbia Circuit under §§ 9011, 9041, to review the FEC's actions under Chapters 95 and 96 of Title 26, and to appear in district court to seek recovery of amounts repayable to the Treasury under §§ 9007, 9008, 9038.

[25] Although the FEC resists appellants' attack on its position that it has "no general substantive rulemaking authority with regard to Title 18 spending and contribution limitations" (FEC Brief 49), it agrees "that there is inevitably some interplay between Title 2 and Title 18." (*Id.*, at 55.) It seeks to minimize the importance of the interplay by noting that its definitions of what is to be disclosed and reported would not be binding in judicial proceedings to determine whether substantive provisions of the Act had been violated, but would simply be extended a measure of deference as administrative interpretations. Appellants' reply is the practical one that, whether the FEC's power is substantive or not, persons violating its regulations do so at their peril. To illustrate the extent to which the FEC's regulations implicate the provisions of Title 18, appellants point to the FEC's interim guidelines for the New Hampshire and Tennessee special elections, 40 Fed. Reg. 40668, 43660 (1975), and its regulations, rejected by the Senate, providing that funds contributed to and expended from the "office accounts" of Members of Congress were contributions or expenditures "subject to the limitations of 18 U. S. C. §§ 608, 610, 611, 613, 614 and 615." See notice of proposed rulemaking, *id.*, at 32951. Unless the FEC's regulations are to be given no weight in criminal proceedings, it seems plain that through those regulations the FEC will have a significant role in the implementation and enforcement of criminal statutes.

of Title 26 contemplating the public financing of political campaigns.[26]

It is apparent that the FEC is charged with the enforcement of the election laws in major respects. Indeed, except for the conduct of criminal proceedings, it would appear that the FEC has the entire responsibility for enforcement of the statutes at issue here. By no stretch of the imagination can its various functions in this respect be considered mere adjuncts to the legislative process or to the powers of Congress to judge the election and qualifications of its own members.

It is suggested, without accounting for the President's role in appointing some of its members, that the FEC would be willing to forgo its civil enforcement powers and that absent these functions, it is left with nothing that purely legislative officers may not do. The difficulty is that the statute invests the FEC not only with the authority but with the *duties* that unquestionably make its members officers of the United States, fully as much as the members of other commissions charged with the major responsibility for administering statutes. What is more, merely forgoing its authority to bring suit would still leave the FEC with the power to issue rules and regulations, its advisory opinion authority, and primary duties to enforce the Act. Absent notice and hearing by the FEC and a request on its part, it would not appear that the Executive Branch of the Government would have any authority under the statute to institute civil enforcement proceedings with respect to the reporting and disclosure requirements or the relevant provisions of Titles 18 and 26.

There is no doubt that the development of the admin-

[26] The FEC itself cannot fashion coercive relief by, for example, issuing cease-and-desist orders. To obtain such relief it must apply to the courts itself or through the Attorney General.

istrative agency in response to modern legislative and administrative need has placed severe strain on the separation-of-powers principle in its pristine formulation. See *Kilbourn* v. *Thompson,* 103 U. S. 168, 191 (1881). Any notion that the Constitution bans any admixture of powers that might be deemed legislative, executive, and judicial has had to give way. The independent agency has survived attacks from various directions: that it exercises invalidly delegated legislative power, *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381 (1940); that it invalidly exercises judicial power, *ibid.;* and that its functions are so executive in nature that its members must be subject to Presidential control, *Humphrey's Executor* v. *United States,* 295 U. S. 602 (1935). Until now, however, it has not been insisted that the commands of the Appointments Clause must also yield to permit congressional appointments of members of a major agency. With the Court, I am not convinced that we should create a broad exception to the requirements of that Clause that all officers of the United States be appointed in accordance with its terms. The provision applies to all officers, however their duties may be classified; and even if some of the FEC's functions, such as rulemaking, are purely legislative, I know of no authority for the congressional appointment of its own agents to make binding rules and regulations necessary to or advisable for the administration and enforcement of a major statute where the President has not participated either in the appointment of each of the administrators or in the fashioning of the rules or regulations which they propound.

I do not dispute the legislative power of Congress coercively to gather and make available for public inspection massive amounts of information relevant to the legislative process. Its own officers may, as they have

done for years, receive and file contribution and expenditure reports of candidates and political committees. Arguably, the Commissioners, although not properly appointed by the President, should at least be able to perform this function. But the members of the FEC are appointed for definite terms of office, are not removable by the President or by Congress, and even if their duties were to be severely limited, they would appear to remain Art. II officers. In any event, the task of gathering and publishing campaign finance information has been one of the specialties of the officers of the respective Houses, and these same officers under the present law continue to receive such information and to act as custodians for the FEC, at least with respect to the Senate and House political campaigns. They are also instructed to cooperate with the FEC. § 438 (d).

For these reasons I join in the Court's answers to certified questions 8 (a), 8 (b), 8 (c), 8 (e) and 8 (f), and with the following reservations to question 8 (d).

Question 8 (d) asks whether § 438 (c) violates the constitutional rights of one or more of the plaintiffs in that "it empowers the Federal Election Commission to make rules under the F. E. C. A. in the manner specified therein." Section 438 (c) imposes certain preconditions to the effectiveness of "any rule or regulation under this section . . . ," but does not itself authorize the issuance of rules or regulations. That authorization is to be found in § 438 (a)(10), which includes among the duties of the FEC the task of prescribing "rules and regulations to carry out the provisions of this subchapter, in accordance with the provisions of subsection (c)." The "subchapter" referred to is the subchapter dealing with federal election campaigns and the reports of contributions and expenditures required to be filed with the FEC.[27] Subsection

[27] The same preconditions are imposed with respect to regulations

(c), which is the provision expressly mentioned in question 8 (d), requires that any rule or regulation prescribed by the FEC under § 438 shall be transmitted to the Senate or the House, or to both as thereafter directed. After 30 legislative days,[28] the rule or regulation will become effective unless (1) either House has disapproved the rule if it relates to reports by Presidential candidates or their supporting committees; (2) the House has disapproved it if it relates to reports to be filed by House candidates or their committees; or (3) the Senate has disapproved it if the rule relates to reports by Senate candidates or their related committees.

By expressly referring to subsection (c), question 8 (d) appears to focus on the disapproval requirement; but the Court's answer is not responsive in these terms. Rather, the Court expressly disclaims holding that the FEC's rules and regulations are invalid because of the requirement that they are subject to disapproval by one or both Houses of Congress. *Ante*, at 140 n. 176. As I understand it, the FEC's rules and regulations, whether or not issued in compliance with § 438 (c), are invalid because the members of the FEC have not been appointed in accordance with Art. II. To the extent that this is the basis for the Court's answer to the question, I am in agreement.

If the FEC members had been nominated by the President and confirmed by the Senate as provided in Art. II,

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issued under the public financing provisions of the election laws. 26 U. S. C. §§ 9009 and 9039 (1970 ed., Supp. IV). No such requirement appears to exist with respect to the FEC's power to make "policy" with respect to the enforcement of the criminal provisions in Title 18 or with respect to any power it may have to issue rules and regulations dealing with the civil enforcement of those provisions. See also § 439a.

[28] Section 438 (c) (4) defines "legislative day." See also 26 U. S. C. §§ 9009 (c) (3), 9039 (c) (3) (1970 ed., Supp. IV).

nothing in the Constitution would prohibit Congress from empowering the Commission to issue rules and regulations without later participation by, or consent of, the President or Congress with respect to any particular rule or regulation or initially to adjudicate questions of fact in accordance with a proper interpretation of the statute. *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381 (1940); *RFC* v. *Bankers Trust Co.,* 318 U. S. 163 (1943); *Humphrey's Executor* v. *United States,* 295 U. S. 602 (1935). The President must sign the statute creating the rulemaking authority of the agency or it must have been passed over his veto, and he must have nominated the members of the agency in accordance with Art. II; but agency regulations issued in accordance with the statute are not subject to his veto even though they may be substantive in character and have the force of law.

I am also of the view that the otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress. For a bill to become law it must pass both Houses and be signed by the President or be passed over his veto. Also, "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . ." is likewise subject to the veto power.[29] Under § 438 (c) the FEC's regulations are subject to disapproval; but for a regulation to become effective, neither House need approve it, pass it, or take any action at all with respect to it. The regulation becomes effective by nonaction. This no more invades the President's powers than does a regulation not required to be laid before Congress. Congressional influence over the substantive content of agency regulation may be en-

[29] U. S. Const., Art. I, § 7, cl. 3.

hanced, but I would not view the power of either House to disapprove as equivalent to legislation or to an order, resolution, or vote requiring the concurrence of both Houses.[30]

In terms of the substantive content of regulations and the degree of congressional influence over agency lawmaking, I do not suggest that there is no difference between the situation where regulations are subject to disapproval by Congress and the situation where the agency need not run the congressional gantlet. But the President's veto power, which gives him an important role in the legislative process, was obviously not considered an inherently *executive* function. Nor was its principal aim to provide another check against poor legislation. The major purpose of the veto power appears to have been to shore up the Executive Branch and to provide it with some bargaining and survival power against what the Framers feared would be the overweening power of legislators. As Hamilton said, the veto power was to provide a defense against the legislative department's intrusion on the rights and powers of other departments; without such power, "the legislative and executive powers might speedily come to be blended in the same hands." [31]

I would be much more concerned if Congress purported to usurp the functions of law enforcement, to control the outcome of particular adjudications, or to pre-empt the President's appointment power; but in the

[30] Surely the challengers to the provision for congressional disapproval do not mean to suggest that the FEC's regulations must become effective despite the disapproval of one House or the other. Disapproval nullifies the suggested regulation and prevents the occurrence of any change in the law. The regulation is void. Nothing remains on which the veto power could operate. It is as though a bill passed in one House and failed in another.

[31] The Federalist No. 73, pp. 468–469 (Wright ed. 1961).

light of history and modern reality, the provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto. It would be considerably different if Congress itself purported to adopt and propound regulations by the action of both Houses. But here no action of either House is required for the agency rule to go into effect, and the veto power of the President does not appear to be implicated.

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I join in all of the Court's opinion except Part I–C–2, which deals with 18 U. S. C. § 608 (a) (1970 ed., Supp. IV). That section limits the amount a candidate may spend from his personal funds, or family funds under his control, in connection with his campaigns during any calendar year. See *ante*, at 51–52, n. 57. The Court invalidates § 608 (a) as violative of the candidate's First Amendment rights. "[T]he First Amendment," the Court explains, "simply cannot tolerate § 608 (a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Ante*, at 54. I disagree.

To be sure, § 608 (a) affects the candidate's exercise of his First Amendment rights. But unlike the other expenditure limitations contained in the Act and invalidated by the Court—the limitation on independent expenditures relative to a clearly identified candidate, § 608 (e), and the limitations on overall candidate expenditures, § 608 (c)—the limitations on expenditures by candidates from personal resources contained in § 608 (a) need never prevent the speaker from spending another

dollar to communicate his ideas. Section 608 (a) imposes no overall limit on the amount a candidate can spend; it simply limits the "contribution" a candidate may make to his own campaign. The candidate remains free to raise an unlimited amount in contributions from others. So long as the candidate does not contribute to his campaign more than the amount specified in § 608 (a), and so long as he does not accept contributions from others in excess of the limitations imposed by § 608 (b), he is free to spend without limit on behalf of his campaign.

It is significant, moreover, that the ceilings imposed by § 608 (a) on candidate expenditures from personal resources are substantially higher than the $1,000 limit imposed by § 608 (e) on independent expenditures by noncandidates. Presidential and Vice Presidential candidates may contribute $50,000 of their own money to their campaigns, Senate candidates $35,000, and most House candidates $25,000. Those ceilings will not affect most candidates. But they will admittedly limit the availability of personal funds for some candidates, and the question is whether that limitation is justified.

The Court views "[t]he ancillary interest in equalizing the relative financial resources of candidates" as the relevant rationale for § 608 (a), and deems that interest insufficient to justify § 608 (a). *Ante*, at 54. In my view the interest is more precisely the interest in promoting the reality and appearance of equal access to the political arena. Our ballot-access decisions serve as a reminder of the importance of the general interest in promoting equal access among potential candidates. See, *e. g.*, *Lubin* v. *Panish*, 415 U. S. 709 (1974); *Bullock* v. *Carter*, 405 U. S. 134 (1972). While admittedly those cases dealt with barriers to entry different from those we consider here, the barriers to which § 608 (a) is di-

rected are formidable ones, and the interest in removing them substantial.

One of the points on which all Members of the Court agree is that money is essential for effective communication in a political campaign. It would appear to follow that the candidate with a substantial personal fortune at his disposal is off to a significant "headstart." Of course, the less wealthy candidate can potentially overcome the disparity in resources through contributions from others. But ability to generate contributions may itself depend upon a showing of a financial base for the campaign or some demonstration of pre-existing support, which in turn is facilitated by expenditures of substantial personal sums. Thus the wealthy candidate's immediate access to a substantial personal fortune may give him an initial advantage that his less wealthy opponent can never overcome. And even if the advantage can be overcome, the perception that personal wealth wins elections may not only discourage potential candidates without significant personal wealth from entering the political arena, but also undermine public confidence in the integrity of the electoral process.[1]

The concern that candidacy for public office not become, or appear to become, the exclusive province of the wealthy assumes heightened significance when one considers the impact of § 608 (b), which the Court today upholds. That provision prohibits contributions from individuals and groups to candidates in excess of $1,000, and contributions from political committees in excess of $5,000. While the limitations on contributions are neutral in the sense that

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[1] "In the Nation's seven largest States in 1970, 11 of the 15 major senatorial candidates were millionaires. The four who were not millionaires lost their bid for election." 117 Cong. Rec. 42065 (1971) (remarks of Rep. Macdonald).

all candidates are foreclosed from accepting large contributions, there can be no question that large contributions generally mean more to the candidate without a substantial personal fortune to spend on his campaign. Large contributions are the less wealthy candidate's only hope of countering the wealthy candidate's immediate access to substantial sums of money. With that option removed, the less wealthy candidate is without the means to match the large initial expenditures of money of which the wealthy candidate is capable. In short, the limitations on contributions put a premium on a candidate's personal wealth.

In view of § 608 (b)'s limitations on contributions, then, § 608 (a) emerges not simply as a device to reduce the natural advantage of the wealthy candidate, but as a provision providing some symmetry to a regulatory scheme that otherwise enhances the natural advantage of the wealthy.[2] Regardless of whether the goal of equalizing access would justify a legislative limit on personal candidate expenditures standing by itself, I think it clear that that goal justifies § 608 (a)'s limits when they are considered in conjunction with the remainder of the

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[2] Of course, § 608 (b)'s enhancement of the wealthy candidate's natural advantage does not require its invalidation. As the Court demonstrates, § 608 (b) is fully justified by the governmental interest in limiting the reality and appearance of corruption. *Ante*, at 26–29.

In addition to § 608 (a), § 608 (c), which limits overall candidate expenditures in a campaign, also provides a check on the advantage of the wealthy candidate. But we today invalidate that section, which unlike § 608 (a) imposes a flat prohibition on candidate expenditures above a certain level, and which is less tailored to the interest in equalizing access than § 608 (a). The effect of invalidating both § 608 (c) and § 608 (a) is to enable the wealthy candidate to spend his personal resources without limit, while his less wealthy opponent is forced to make do with whatever amount he can accumulate through relatively small contributions.

Act. I therefore respectfully dissent from the Court's invalidation of § 608 (a).

MR. JUSTICE BLACKMUN, concurring in part and dissenting in part.

I am not persuaded that the Court makes, or indeed is able to make, a principled constitutional distinction between the contribution limitations, on the one hand, and the expenditure limitations, on the other, that are involved here. I therefore do not join Part I–B of the Court's opinion or those portions of Part I–A that are consistent with Part I–B. As to those, I dissent.

I also dissent, accordingly, from the Court's responses to certified questions 3 (b), (c), and (h). I would answer those questions in the affirmative.

I do join the remainder of the Court's opinion and its answers to the other certified questions.

MR. JUSTICE REHNQUIST, concurring in part and dissenting in part.

I concur in Parts I, II, and IV of the Court's opinion. I concur in so much of Part III of the Court's opinion as holds that the public funding of the cost of a Presidential election campaign is a permissible exercise of congressional authority under the power to tax and spend granted by Art. I, but dissent from Part III–B–1 of the Court's opinion, which holds that certain aspects of the statutory treatment of minor parties and independent candidates are constitutionally valid. I state as briefly as possible my reasons for so doing.

The limits imposed by the First and Fourteenth Amendments on governmental action may vary in their stringency depending on the capacity in which the government is acting. The government as proprietor, *Adderley* v. *Florida*, 385 U. S. 39 (1966), is, I believe,

permitted to affect putatively protected interests in a manner in which it might not do if simply proscribing conduct across the board. Similarly, the government as employer, *Pickering* v. *Board of Education,* 391 U. S. 563 (1968), and *CSC* v. *Letter Carriers,* 413 U. S. 548 (1973), may prescribe conditions of employment which might be constitutionally unacceptable if enacted into standards of conduct made applicable to the entire citizenry.

For the reasons stated in the dissenting opinion of Mr. Justice Jackson in *Beauharnais* v. *Illinois,* 343 U. S. 250, 288–295 (1952), and by Mr. Justice Harlan in his dissenting opinion in *Roth* v. *United States,* 354 U. S. 476, 500–503 (1957), I am of the opinion that not all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment, but rather that it is only the "general principle" of free speech, *Gitlow* v. *New York,* 268 U. S. 652, 672 (1925) (Holmes J., dissenting), that the latter incorporates. See *Palko* v. *Connecticut,* 302 U. S. 319, 324–325 (1937).

Given this view, cases which deal with state restrictions on First Amendment freedoms are not fungible with those which deal with restrictions imposed by the Federal Government, and cases which deal with the government as employer or proprietor are not fungible with those which deal with the government as a lawmaker enacting criminal statutes applying to the population generally. The statute before us was enacted by Congress, not with the aim of managing the Government's property nor of regulating the conditions of Government employment, but rather with a view to the regulation of the citizenry as a whole. The case for me, then, presents the First Amendment interests of the appellants at their strongest, and the legislative authority of Congress in the position where it is most vulnerable to First Amendment attacks.

While this approach undoubtedly differs from some of the underlying assumptions in the opinion of the Court, opinions are written not to explore abstract propositions of law but to decide concrete cases. I therefore join in all of the Court's opinion except Part III–B–1, which sustains, against appellants' First and Fifth Amendment challenges, the disparities found in the congressional plan for financing general Presidential elections between the two major parties, on the one hand, and minor parties and candidacies on the other.

While I am not sure that I agree with the Court's comment, *ante*, at 95, that "public financing is generally less restrictive of access to the electoral process than the ballot-access regulations dealt with in prior cases," in any case that is not, under my view, an adequate answer to appellants' claim. The electoral laws relating to ballot access which were examined in *Lubin* v. *Panish*, 415 U. S. 709, 716 (1974); *American Party of Texas* v. *White*, 415 U. S. 767, 780 (1974); and *Storer* v. *Brown*, 415 U. S. 724, 729 730 (1974), all arose out of state efforts to regulate minor party candidacies and the actual physical size of the ballot. If the States are to afford a republican form of government, they must by definition provide for general elections and for some standards as to the contents of the official ballots which will be used at those elections. The decision of the state legislature to enact legislation embodying such regulations is therefore not in any sense an optional one; there must be some standards, however few, which prescribe the contents of the official ballot if the popular will is to be translated into a choice among candidates. Dealing thus by necessity with these issues, the States have strong interests in "limiting places on the ballot to those candidates who demonstrate substantial popular support," *ante*, at 96. They have a like interest in discouraging

"splintered parties and unrestrained factionalism" which might proliferate the number of candidates on a state ballot so as to make it virtually unintelligible to the average voter. *Storer* v. *Brown, supra,* at 736.

Congress, on the other hand, while undoubtedly possessing the legislative authority to undertake the task if it wished, is not obliged to address the question of public financing of Presidential elections at all. When it chooses to legislate in this area, so much of its action as may arguably impair First Amendment rights lacks the same sort of mandate of necessity as does a State's regulation of ballot access.

Congress, of course, does have an interest in not "funding hopeless candidacies with large sums of public money," *ante,* at 96, and may for that purpose legitimately require " 'some preliminary showing of a significant modicum of support,' *Jenness* v. *Fortson,* [403 U. S. 431, 442 (1971),] as an eligibility requirement for public funds." *Ante,* at 96. But Congress in this legislation has done a good deal more than that. It has enshrined the Republican and Democratic Parties in a permanently preferred position, and has established requirements for funding minor-party and independent candidates to which the two major parties are not subject. Congress would undoubtedly be justified in treating the Presidential candidates of the two major parties differently from minor-party or independent Presidential candidates, in view of the long demonstrated public support of the former. But because of the First Amendment overtones of the appellants' Fifth Amendment equal protection claim, something more than a merely rational basis for the difference in treatment must be shown, as the Court apparently recognizes. I find it impossible to subscribe to the Court's reasoning that because no third party has posed a credible threat to the two major parties in Presi-

dential elections since 1860, Congress may by law attempt to assure that this pattern will endure forever.

I would hold that, as to general election financing, Congress has not merely treated the two major parties differently from minor parties and independents, but has discriminated in favor of the former in such a way as to run afoul of the Fifth and First Amendments to the United States Constitution.

Syllabus

ALAMO LAND & CATTLE CO., INC. *v.* ARIZONA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–125. Argued October 14–15, 1975—
Decided February 24, 1976

In 1962 Arizona, as lessor, and petitioner, as lessee, executed a 10-year grazing lease of certain tracts of land which had been granted to Arizona to be held in trust under the New Mexico-Arizona Enabling Act. In 1966 the United States filed a condemnation complaint in connection with a flood control dam and reservoir which included the leased tracts. In allocating the stipulated compensation payable by the United States for the tracts the District Court awarded Arizona a certain amount for its fee interest and petitioner one amount for the improvements and another amount for "its leasehold interest at the time of taking and its reasonable prospective leasehold interest." The Court of Appeals, while recognizing that petitioner was entitled to compensation for the improvements, and finding it unnecessary to determine petitioner's rights based upon the provisions of the lease or upon state law, held that under the Enabling Act Arizona, as trustee, had no power to grant a compensable leasehold interest and that petitioner therefore never acquired a property right for which it is entitled to compensation. *Held:*

1. Nothing in the Enabling Act, apart, possibly, from the extent it may incorporate Arizona law by reference, prevents the usual application of Fifth Amendment protection of the outstanding leasehold interest whereby the holder of such an interest is entitled to just compensation for the value of that interest when it is taken upon condemnation by the United States. Pp. 300–308.

2. To be determined on remand are (1) whether, under state law and the provisions of the lease, petitioner could not possess a compensable leasehold interest upon the federal condemnation; (2) if petitioner did possess such an interest, how it is properly to be evaluated and calculated (with the subsidiary questions of the relevance of possible lease renewals and of possible value additions by reason of petitioner's development of adjoining properties); and (3) if that interest proves to be substantial, whether it is permissible to find from that fact a violation of the

Enabling Act's requirement that a lease, when offered, shall be appraised at its "true value" and be given at not less than that value. Pp. 308–311.

495 F. 2d 12, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 311. STEVENS, J., took no part in the consideration or decision of the case.

J. Gordon Cook argued the cause and filed briefs for petitioner.

Peter C. Gulatto, Assistant Attorney General of Arizona, argued the cause for respondent. With him on the brief was *Bruce E. Babbitt,* Attorney General.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents an issue of federal condemnation law—as it relates to an outstanding lease of trust lands—that, we are told, affects substantial acreage in our Southwestern and Western States.

I

Under § 24 [1] of the New Mexico-Arizona Enabling Act, 36 Stat. 572 (1910), specified sections of every township in the then proposed State were granted to Arizona "for the support of common schools." By § 28 [2]

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[1] "Sec. 24. That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools . . . ."

[2] "Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed

of the same Act, 36 Stat. 574, as amended by the Act of June 5, 1936, c. 517, 49 Stat. 1477, and by the Act of June 2, 1951, 65 Stat. 51, the lands transferred "shall

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to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

"No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. . . . Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and homesite purposes, for a term of ten years or less; . . . or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee.

"All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained . . . .

"No lands shall be sold for less than their appraised value . . . .

. . . . .

"A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular

be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified . . . and . . . the . . . proceeds of any of said lands shall be subject to the same trusts as the lands producing the same." Arizona, by its Constitution, Art. 10, § 1,[3] accepted the lands so granted and its trusteeship over them.

Among the lands constituting the grant to Arizona were two parcels herein referred to as Tract 304 and Tract 305, respectively.[4] On February 8, 1962, Arizona, as lessor, and petitioner Alamo Land and Cattle Company, Inc. (Alamo), as lessee, executed a grazing lease of

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land producing such moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. . . .

"Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding."

[3] "All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

[4] Tract 304:

"All of Section 2, Township 10 North, Range 13 West, Gila and Salt River Base and Meridian, Yuma County, Arizona."

Tract 305:

"All of Section 36, Township 11 North, Range 13 West, Gila and Salt River Base and Meridian, Yuma County, Arizona." App. 1–2.

these tracts for the 10-year period ending February 7, 1972. App. 6–14. By Arizona statute, Ariz. Rev. Stat. Ann. 37–281D (1974), incorporated by general reference into the lease, App. 7, Alamo may not use the lands for any purpose other than grazing.

On May 31, 1966, while the two tracts were subject to the grazing lease and were utilized as part of Alamo's larger operating cattle ranch, the United States filed a complaint in condemnation in the United States District Court for the District of Arizona in connection with the establishment of a flood control dam and reservoir at a site on the Bill Williams River. The tracts in their entirety were among the properties that were the subject of the complaint in condemnation. The District Court duly entered the customary order for delivery of possession.[5]

Thereafter, the United States and Arizona and, separately, the United States and Alamo, stipulated that "the full just compensation" payable by the United States "for the taking of said property, together with all improvements thereon and appurtenances thereunto belonging" was $48,220 for Tract 304 and $70,400 for Tract 305, and thus a total of $118,620 for the two. 1 Record 156, 162.[6]

At a distribution hearing held to determine the proper allocation of the compensation amounts, the only parties claiming an interest in the awards for the two tracts were respondent Arizona, asserting title through the federal grants to it, and petitioner Alamo, asserting a compensable leasehold interest in the lands and a compensable

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[5] No question is raised as to the propriety or effectiveness of the condemnation procedure.

[6] These figures were also the compensation estimated for the respective tracts in the declaration of taking and paid into court. 1 Record 15.

interest in the improvements thereon. The State conceded that Alamo was entitled to receive the value of the improvements, but contested Alamo's right, as lessee, to participate in the portion of the award allocated to land value. The District Court, with an unreported opinion, App. 1–5, awarded Arizona $57,970 for its fee interest, and awarded Alamo $3,600 for the improvements and $57,050 for "its leasehold interest at the time of taking, and its reasonable prospective leasehold interest." 1 Record 227–228. On appeal, the United States Court of Appeals for the Ninth Circuit, while recognizing that Alamo was entitled to compensation for the improvements, held that under the Enabling Act Arizona "had no power to grant a compensable property right to Alamo," and that "Alamo therefore never acquired a property right for which it is entitled to compensation." *United States* v. *2,562.92 Acres of Land*, 495 F. 2d 12, 14 (1974). The Court of Appeals thus reversed the judgment of the District Court insofar as it concerned the leasehold interests. It remanded the cause for the entry of a new judgment in accordance with its opinion. *Id.*, at 15. Because the Ninth Circuit's decision appeared to implicate this Court's decision in *Lassen* v. *Arizona ex rel. Arizona Highway Dept.*, 385 U. S. 458 (1967), and because it was claimed to be in conflict with *Nebraska* v. *United States*, 164 F. 2d 866 (CA8 1947), cert. denied, 334 U. S. 815 (1948), we granted Alamo's petition for certiorari. 420 U. S. 971 (1975).

II

The *Lassen* case was an action instituted by the Arizona Highway Department to prohibit the application by the State Land Commissioner of rules governing the acquisition of rights-of-way and material sites in federally donated lands held by Arizona in trust pursuant to the provisions of the Enabling Act. What was involved,

therefore, was the acquisition of interests in trust lands by the State itself. The Supreme Court of Arizona held that it could be presumed conclusively that highways constructed across trust lands always enhanced the value of the remainder in amounts at least equal to the value of the areas taken and therefore refused to order the Highway Department to compensate the trust. *State* v. *Lassen,* 99 Ariz. 161, 407 P. 2d 747 (1965). This Court unanimously reversed. In so doing, it observed that the more recent federal grants to newly admitted States, including Arizona, "make clear that the United States has a continuing interest in the administration of both the lands and the funds which derive from them." 385 U. S., at 460.

The Court read § 28 of the Enabling Act with particularity. It emphasized the Act's requirements that trust lands be sold or leased only to " 'the highest and best bidder' "; that no lands be sold for less than their appraised value; that disposal of trust lands be " 'only in manner as herein provided' "; that disposition in any other way " 'shall be deemed a breach of trust' "; and that every sale or lease " 'not made in substantial conformity with the provisions of this Act shall be null and void.' " 385 U. S., at 461–462. The Court then examined the purposes of the Act and concluded that the grant "was plainly expected to produce a fund, accumulated by sale and use of the trust lands, with which the State could support the public institutions designated by the Act." *Id.,* at 463. Sales and leases were intended. The "central problem" was "to devise constraints which would assure that the trust received in full fair compensation for trust lands." *Ibid.* The Court concluded, for reasons stated in the opinion, that the Act's procedural restrictions did not apply when the State itself sought trust lands for its highway program.

The Court then turned to the standard of compensation Arizona must employ to recompense the trust for the interests the State acquired. It concluded that the terms and purposes of the grant did not permit Arizona to diminish the actual monetary compensation payable to the trust by the amount of any enhancement in the value of remaining trust lands. The Court emphasized that the Enabling Act "unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given." *Id.*, at 466. It again stressed the requirements of the Act and noted that "these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust." *Id.*, at 467. All this was confirmed by the background and legislative history of the Enabling Act. Accordingly, it held that even where the State itself is the acquisitor, the Act's designated beneficiaries were to derive the full benefit of the grant. Thus, "Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights-of-way which it obtains on or over trust lands." *Id.*, at 469[7] (footnotes omitted). This standard, it was said, "most consistently reflects the essential purposes of the grant." *Id.*, at 470.

Much of what was said in *Lassen* had also been said, several decades earlier, in *Ervien* v. *United States*, 251 U. S. 41 (1919), when the provisions of the same Enabling Act were under consideration in a federal case from New Mexico. The Court's concern for the integrity of the conditions imposed by the Act, therefore, has long been evident.

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[7] The full-value provision does not exclude an appropriate deferred-payment arrangement. 385 U. S., at 469, n. 21.

But to say, as the Court did in *Ervien* and in *Lassen*, that the trust is to receive the full value of any lands transferred from it is not to say that the Act requires, in every Arizona case where a leasehold is outstanding at the time of the federal condemnation, that the trust is to receive the entire then value of the land and the possessor of the leasehold interest is to receive nothing whatsoever. What the Act requires—and we think that this is clear from *Ervien* and *Lassen*—is that the trust is to receive, at the time of its disposition of any interest in the land, the then full value of the particular interest which is being dispensed.

It has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment,[8] to just compensation for the value of that interest when it is taken upon condemnation by the United States. *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946); *A. W. Duckett & Co.* v. *United States*, 266 U. S. 149 (1924). See *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945); *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U. S. 470 (1973); 2 P. Nichols, Eminent Domain § 5.23 (Rev. 3d ed. 1975); 4 *id.* § 12.42 [1]. It would therefore seem to follow that when a lease of trust land is made, the trust must receive from the lessee the then fair rental value of the possessory interest transferred by the lease, and that upon a subsequent condemnation by the United States, the trust must receive the then full value of the reversionary interest that is subject to the outstanding lease, plus, of course, the value of the rental rights under the lease. The trust should not be entitled, in addition to all this, to receive the compensable value,

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[8] "[N]or shall private property be taken for public use, without just compensation."

if any, of the leasehold interest. That, if it exists and if the lease is valid, is the lessee's. See *State ex rel. La Prade* v. *Carrow*, 57 Ariz. 429, 433–434, 114 P. 2d 891, 893 (1941).

Ordinarily, a leasehold interest has a compensable value whenever the capitalized then fair rental value for the remaining term of the lease, plus the value of any renewal right, exceeds the capitalized value of the rental the lease specifies. The Court has expressed it this way:

> "The measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew . . . , less the agreed rent which the tenant would pay for such use and occupancy." *United States* v. *Petty Motor Co.*, 327 U. S., at 381.

See *Almota Farmers Elevator & Warehouse Co.* v. *United States*, *supra*. A number of factors, of course, could operate to eliminate the existence of compensable value in the leasehold interest. Presumably, this would be so if the Enabling Act provided, as the New Mexico-Arizona Act does not, that any lease of trust land was revocable at will by the State, or if it provided that, upon sale or condemnation of the land, no compensation was payable to the lessee. The State, of course, may require that a provision of this kind be included in the lease. See *United States* v. *Petty Motor Co.*, 327 U. S., at 375–376, and n. 4; see also 4 Nichols, *supra*, § 12.42 [1], pp. 12–488 and 12–489.

A difference between the rental specified in the lease and the fair rental value plus the renewal right could arise either because the lease rentals were set initially at less than fair rental value, or because during the term of the lease the value of the land, and consequently its fair rental value, increased. The New Mexico-Arizona En-

abling Act has a protective provision against the initial setting of lease rentals at less than fair rental value. This is specifically prohibited by § 28. The prohibition is given bite by the further very drastic provision that a lease not made in substantial conformity with the Act "shall be null and void." Thus, if the lease of trust lands calls for a rental of substantially less than the land's then fair rental value, it is null and void and the holder of the claimed leasehold interest could not be entitled to compensation upon condemnation.

On the other hand, the fair rental value of the land may increase during the term of the lease.[9] If this takes place, the increase in fair rental value operates to create a compensable value in the leasehold interest. It is at this point, we feel, that the Court of Appeals erred when it held that the Act by its terms, and apart from the extent to which it incorporated Arizona law by reference, barred Arizona from leasing trust land in any manner that might result in the lessee's becoming constitutionally entitled to just compensation for the value of its unexpired leasehold interest at the time of the federal condemnation. Instead, the Act is completely silent in this respect.

III

Arizona, however, suggests that this usually acceptable analysis may not be applied under the New Mexico-Arizona Enabling Act. It argues, as the Court of Appeals held, 495 F. 2d, at 14, that under that Act the State, as trustee, has no power to grant a compensable prop-

[9] The Arizona statutes governing grazing leases of trust lands recognize this possibility and provide for adjustment of rent at specified times to account for fluctuations in fair rental value. Ariz. Rev. Stat. Ann. §§ 37-283, 37-285 (1974). Indeed, under § 28 of the Enabling Act, at the termination of a lease, a re-evaluation would appear to be required before release or renewal.

erty interest to Alamo, as lessee. It bases this thesis on the Enabling Act's provision in § 28 that no "mortgage or other encumbrance" of trust land shall be valid, and it claims that a lease is an encumbrance, citing, among other cases, *Hecketsweiler* v. *Parrett*, 185 Ore. 46, 52, 200 P. 2d 971, 974 (1948) (agreement to sell real estate free and clear of encumbrances), and *Hartman* v. *Drake*, 166 Neb. 87, 91, 87 N. W. 2d 895, 898 (1958) (partition). One seemingly apparent and complete answer to this argument is that § 28 goes on to authorize specifically a lease of trust land for grazing purposes for a term of 10 years or less, and further provides that a leasehold, before being offered, shall be appraised at "true value." See n. 2, *supra*. These provisions thus plainly contemplate the possibility of a lease of trust land and, in so doing, intimate that such a lease is not a prohibited "mortgage or other encumbrance." [10] Furthermore, Arizona statutes in other contexts specifically protect the lessee's interest. Ariz. Rev. Stat. Ann. §§ 41–511.06, 37–291 (1974). See *Ehle* v. *Tenney Trading Co.*, 56 Ariz. 241, 107 P. 2d 210 (1940). To this the State responds that, while a lease is possible, it falls short of being a compensable interest when the property is sold because the Act prohibits the sale unless the trust receives the full appraised value of the land. The argument assumes that such compensation is to be measured by the entire land value despite the presence of the outstanding lease. That approach overlooks the actuality of a two-step dis-

[10] The Supreme Court of New Mexico long ago ruled that a grazing lease of state lands is not a "mortgage or . . . encumbrance," within the meaning of the identical prohibition, applicable to New Mexico, in § 10 of the New Mexico-Arizona Enabling Act, 36 Stat. 563. *American Mortgage Co.* v. *White*, 34 N. M. 602, 605–606, 287 P. 702, 703 (1930). See *United States* v. *40,021.64 Acres of Land*, 387 F. Supp. 839, 848–849 (NM 1975); *State ex rel. State Highway Comm'n* v. *Chavez*, 80 N. M. 394, 456 P. 2d 868 (1969).

position of interests in the land, the first at the time of the granting of the lease, and the second at the time of the condemnation. Full appraised value is to be determined and measured at the times of disposition of the respective interests, and if the State receives those values at those respective times, the demands of the Enabling Act are met. The State's argument would serve to convert and downgrade a 10-year grazing lease, fully recognized and permitted by the Act, into a lease terminable at will or into one automatically terminated whenever the State sells the property or it is condemned. The lessee is entitled to better treatment than this if neither the Enabling Act nor the lease contains any such provision. We have noted above that the Act or the lease, or both, could provide for that result. The Act, however, does not specifically so provide. Whether either the Act or the lease does so through incorporation of state law is an issue not addressed by the Court of Appeals, and it is to be considered on remand. We merely note that the fact that it is within Arizona's power to insert a condemnation clause in a lease it makes of trust land does not mean that the State may claim the same result when its lease contains no such clause.

IV

Alamo suggests that the Court of Appeals' decision is at odds with the above-cited case of *Nebraska* v. *United States*, 164 F. 2d 866 (CA8 1947), cert. denied, 334 U. S. 815 (1948). There, in the face of a totality claim like that made by Arizona here, the Eighth Circuit ruled that trust lands in Nebraska were to be treated as any other property and that condemnation proceeds were subject to allocation between the State as trustee and the holder of an outstanding agricultural lease. The Nebraska Enabling Act of April 19, 1864, c. 59, 13 Stat. 47, was an earlier edition of this type of statute, and was adopted

more than four decades before the New Mexico-Arizona Act. It did not contain the detailed restrictive provisions that appear in the 1910 Act and that were developed and utilized as passing years and experience demonstrated a need for them. Because of this, one may say, as Arizona does, that the *Nebraska* case is distinguishable from the present one. But the decision is not devoid of precedential value, for it is consistent with our analysis of the New Mexico-Arizona Act in its recognition of the possibility of a compensable leasehold interest in trust land upon federal condemnation, and it demonstrates that the existence of that interest is not incompatible with the trust land concept. See also *United States* v. *78.61 Acres of Land*, 265 F. Supp. 564 (Neb. 1967), a post-*Lassen case; United States* v. *40,021.64 Acres of Land*, 387 F. Supp. 839, 848–849 (NM 1975).

V

Finally, the Court of Appeals observed, but only in passing, 495 F. 2d, at 14, that the lease recited that it was made subject to the laws of Arizona; that if the State "relinquished" the property to the United States, the lease "shall be null and void as it may pertain to the land so relinquished"; and that no provision of the lease "shall create any vested right in the lessee." The court also observed, *ibid.*, that Ariz. Rev. Stat. Ann. § 37–242 and 37–293[11] restrict a lessee's participation in the

[11] § 37–242:

"A. When state lands on which there are improvements for which the owner thereof is entitled to be compensated are offered for sale, and the purchaser is not the owner of the improvements, the purchaser shall pay the person conducting the sale ten percent of the appraised value of the improvements and the balance within thirty days thereafter. If the state land department determines that the amount at which the improvements are appraised is so great that competitive bidding for the land will be thereby hindered, the

proceeds of a sale of public land to the value of improvements. Having made these observations, however, the court thereupon concluded that it did not find it neces-

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department may sell the improvements on installments payable ten per cent upon announcement of the successful bidder, fifteen per cent thirty days thereafter, and fifteen per cent annually thereafter for five years, together with six per cent interest on the balance remaining unpaid, which amount, until paid, shall be a lien upon the land. The purchaser shall at all times, keep the insurable improvements insured for the benefit of the state. Payments shall be made at the time and in the manner prescribed for payments on the land, and any default in the payments for improvements shall be deemed a default in the payments for the land.

"B. When improvements are sold on installments, the first twenty-five per cent, after deducting all rents, penalties and costs owing to the state on account of the land, shall be paid to the owner of the improvements, and the balance shall become a legal charge against the state.

"C. Upon surrendering possession of any such land, the owner of the improvements thereof shall file with the commissioner of finance his claim for the balance on the improvements remaining unpaid, and if the claim bears the approval of the department as to correctness, and a certificate that possession of the lands and improvements has been surrendered by all persons having lawful claims for improvements on the land, it shall be paid by the state treasurer on the warrant of the commissioner of finance from any fund in which there is money subject to investment. As payments for the improvements are made by the purchaser, they shall be deposited with the state treasurer and both principal and interest shall be returned by him to the fund from which they were taken.

"D. Failure to pay the balance of the purchase price or the fifteen per cent within thirty days after the announcement of the successful bidder shall constitute a forfeiture of all rights to the land and all payments made."

. . . . .

§ 37–293:

"A. A lessee of state lands shall be reimbursed by a succeeding lessee for improvements placed on the lands which are not removable. If the retiring lessee and the new lessee do not agree upon the value of the improvements, either party may file with the state

sary "to determine the rights of Alamo based upon these lease provisions or the state law." 495 F. 2d, at 14.

The significance of the provisions referred to and of the cited statutes will now be for determination upon remand. We note only that the land in question was condemned and thus does not appear to have been technically "relinquished" by Arizona to the United States; that we are not at all sure that there is language of restriction in §§ 37–242 and 37–293; and that Ariz. Rev. Stat. Ann. §§ 37–288 and 37–290 respectively permit forfeiture for violation of the conditions of a lease or for nonpayment of rent, and cancellation of a lease if the leased land is reclassified to a higher use, and thus could explain the lease's provision against vesting in the technical sense that it is not subject to any contingency whatsoever.

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land department an application for appraisal of the improvements. Thereafter an appraisal of the improvements shall be made in the same manner and subject to the same conditions as appraisals of improvements are made when state lands are sold.

"B. Upon making the appraisal, the department shall give notice of the amount thereof by registered mail to each person interested in the appraisal. The notice shall require that the new lessee pay to the department for the prior lessee the entire amount of the appraisal within thirty days from the date of the notice, or the department, when the value is greater than the rental for the period of the lease, may require that payment of ten per cent of the appraised value be made within thirty days, fifteen per cent within sixty days, twenty-five per cent at the end of the first year of the new lease, and twenty-five per cent at the end of each year thereafter until the entire balance is paid.

"C. If the improvements are not paid for as required in the notice, the succeeding lessee shall not be permitted to sell, assign, or transfer his lease, nor sell, assign or remove any improvements whatever from the land until the entire amount of the appraised value of the improvements has been paid. Upon default he shall be subject to the same penalties and liabilities as provided by § 37–288 for failure to pay rents, including a cancellation of the lease."

To repeat: we hold that nothing in the Enabling Act apart, possibly, from the extent it may incorporate Arizona law by reference, prevents the usual application of Fifth Amendment protection of the outstanding leasehold interest. We leave for determination on remand the following: (1) whether, under state law and the lease provisions, Alamo could not possess a compensable leasehold interest upon the federal condemnation; (2) if Alamo did possess such an interest, how it is properly to be evaluated and calculated (with the subsidiary questions of the relevance of possible lease renewals [12] and of possible value additions by reason of Alamo's development of adjoining properties, cf. *United States* v. *Fuller*, 409 U. S. 488 (1973)); and, (3) if that interest proves to be substantial, whether it is permissible to find from that fact a violation of the Enabling Act's requirement that a lease, when offered, "shall be appraised at [its] true value" and be given at not less than that value.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

The question in this case is whether, under § 28 of the

[12] We note in regard to the possible value of renewal rights that leases of the kind in issue here are limited by statute to 10 years in duration, and that the Act requires that rentals be adjusted to reflect current fair rental value before any renewal. See n. 9, *supra*. Therefore, although we do not foreclose the relevance of possible renewals, the calculation of the lessee's interest cannot include the prospect of renewing the lease at less than fair rental value.

New Mexico-Arizona Enabling Act, 36 Stat. 574, the State of Arizona had the power to grant to petitioner a compensable leasehold interest in the property in issue. The question is solely one of statutory construction. As I agree with the Court of Appeals for the Ninth Circuit that Congress intended that lessees of land covered by the Act should acquire a compensable interest in leased land only to the extent of "improvements . . . placed thereon by such lessee," *United States* v. *2,562.92 Acres of Land*, 495 F. 2d 12, 14 (1974), I dissent.

The Act states expressly, with respect to the lands involved here, that "no mortgage or other encumbrance of the said lands . . . shall be valid in favor of any person or for any purpose or under any circumstances whatsoever." A lease, if not terminable at will by the State or terminable automatically upon sale or condemnation, is clearly an "encumbrance." 7 G. Thompson, Real Property § 3183, p. 277 (1962); 2 Bouvier's Law Dictionary 1530 (8th ed. 1914). A lease not so terminable is, therefore expressly prohibited by the Act. The majority opinion, however, finds implicit in the Act an exception to the express ban on encumbrances in the case of leases for terms of 10 years or less. It points to the fact that 10-year leases of school trust lands are expressly permitted by the Act and states that to treat a lease as an "encumbrance" under the circumstances would be to "downgrade a 10-year grazing lease, fully recognized and permitted by the Act, into a lease terminable at will or into one automatically terminated whenever the State sells the property or it is condemned." *Ante*, at 307. Treating the lease as an encumbrance would certainly have the effect which the majority says it would. The majority does not disclose, however, why such an effect is contrary to the intent of the Act. Apparently, it simply finds illogical

the notion that a lease could be terminable on sale or condemnation and still be a "10-year" lease, notwithstanding the fact that treating 10-year leases as being so terminable is the only way to square them with the Act's unqualified ban on encumbrances.

It is Congress' policy, however, and not our own which we must apply to the Act; and Congress' prior statutes governing leases by States of school trust lands granted to them by the United States strongly support the proposition that Congress viewed an express statutory provision permitting leases of such land for a term of years as entirely consistent with provisions making such leases terminable at will or by sale or condemnation. In 1888 Congress provided, with respect to school trust lands granted to Wyoming, that the lands could be leased for 5-year periods but that such leases could be annulled at will by the Secretary of the Interior. 25 Stat. 393. Of far more significance to this case was Congress' treatment of the lands granted to Oklahoma—the State to enter the Union most recently prior to the entry of Arizona and New Mexico—in the Oklahoma Enabling Act. C. 3335, 34 Stat. 267. In that Act, Congress expressly provided Oklahoma with the authority to lease school trust lands for 10-year periods while also clearly providing that upon sale of the lands during the period of the lease, the lessee would receive only the value of its improvements. That Act states with respect to sales of lands subject to a lease that "preference right to purchase at the highest bid [is] given to *the lessee at the time of such sale*," *id.*, at 274 (emphasis added); and then provides:

> "[I]n case the leaseholder does not become the purchaser, the purchaser at said sale shall, under such rules and regulations as the legislature may prescribe, pay to or for the leaseholder the appraised value

> of . . . improvements, *and to the State the amount bid for said lands, exclusive of the appraised value of improvements . . . .*" *Ibid.* (emphasis added).

The Oklahoma Enabling Act thus clearly provides for the result which the majority finds so illogical and which it declines for that reason alone to attribute to Congress under the New Mexico-Arizona Enabling Act passed only four years later. Moreover, in the single piece of legislative history shedding any light on the relevant portion of the Act, the Senate sponsor of the Act—Senator Beveridge—spoke approvingly of the restrictions placed on Oklahoma in dealing with school trust lands granted to it in the Oklahoma Enabling Act and indicated his belief that the restrictions on Arizona and New Mexico were more stringent. He stated:

> "We took the position [in drafting the Act] that the United States owned this land, and in creating these States we were giving the lands to the States for specific purposes, and that restrictions should be thrown about it which would assure its being used for those purposes."
>
> . . . . .
>
> "We have thrown conditions around land grants in several States heretofore, notably in the case of Oklahoma, but not so thorough and complete as this." 45 Cong. Rec. 8227 (1910).

The Oklahoma Enabling Act prevents the creation of a compensable interest in a lessee of school trust lands except to the extent of improvements placed thereon by him. A literal application of the New Mexico-Arizona Enabling Act at issue here reaches the same result. The latter Act, passed only four years after the Oklahoma Enabling Act, had purposes similar to those of the former. I cannot but conclude that it should also be

construed to prevent the creation of a compensable interest in leaseholds of school trust lands.

Congress' reasons for so limiting the rights of leaseholders is easily discernible from the Act and its legislative history. Congress anticipated that the value of the school trust lands would increase over time and it intended that the *schools,* not leaseholders, benefit from this increase. Pursuing this end, the Act set a minimum sales price for school trust lands of $3 per acre, 36 Stat. 574, the House committee report explaining:

> "The bill fixes a minimum price at which the lands granted for educational purposes subject to sale may be sold. . . .
>
> "It is recognized by the committee as well as by other earnest advocates of a minimum price, that practically none of these lands are worth now anything like the minimum price fixed. . . . It is believed, however, that the advance of science, the extension of public and private irrigation projects, and the tendency toward the higher development of smaller holdings will, in the case of Arizona and New Mexico, as in the case of other States, *result in a sure, although possibly slow, increase of land values.*
>
> "The educational lands which are subject to sale would probably not bring on the market now much more than 25 cents an acre, but if the history of other states in which minimum prices, which at the time were considered prohibitive, were fixed shall be repeated in Arizona and New Mexico, it is of the utmost importance that some restriction be placed upon the sale of these lands.
>
> "The experience of other States and the importance of fixing a minimum selling price for educational lands is indicated in the following extract

from a letter from former Secretary of the Interior Garfield addressed to the chairman of the committee in the last Congress:

"'The history of the public-land States in the matter of the disposal of granted school lands has convinced me that those States which have a minimum price fixed on their lands granted for educational purposes get a much larger return from their lands. I am informed that most States with no minimum have not disposed of their lands to the best advantage, thus seriously failing to derive the full benefit to which the schools are entitled. The States of North and South Dakota, Montana, Wyoming, Idaho, and Washington have a $10 minimum fixed on their lands, and I am informed that none of these States, unless it is Wyoming, feels that this high minimum is harmful.

"'On the contrary, I find that officials of these States are zealous and proud of the splendid school funds which they are creating from the sale of school lands. North Dakota, which a few years ago seemed to contain immense areas of poor land, is, I am informed, obtaining in many cases $15 or $20 per acre for its school sections. Colorado seems to have an exceedingly low minimum, $2.50; and nevertheless it has administered its land grants unusually well, securing from them very large returns, both from sales and from leases. For these reasons, I urge that a minimum price be fixed for these proposed new States. They will be able to lease most of their land, if it is not worth to-day the minimum price, and will thereby obtain an income.'" H. R. Rep. No. 152, 61st Cong., 2d Sess., 2–3 (1910).

If leases were permitted to encumber school trust lands

at a time when they were worth less than the minimum sales price, then when the land rose in value—as Congress anticipated it would—and was sold for the minimum price or more, the State would have to give part of such sales price to the lessee. Such a result is utterly irreconcilable with the reasons for setting minimum sales prices. Plainly, Congress intended the school trust to receive the *full* sales price and to prevent the States from disposing of the lands in any fashion which would result in its receiving any less. Lessees were to receive none of the proceeds of sale of the land itself even if the land had appreciated in value subsequent to the creation of the lease.

To make its purpose even clearer, Congress, in dealing with the very question of whether the lessee should share in the proceeds when lands subject to the lease are sold, provided:

> "Nothing herein contained shall prevent . . . (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee." 65 Stat. 52.

The Act provides for no other kind of compensation to the lessee of lands sold. Under the majority opinion a lessee could, if the value of the lands increased after the lease was entered into, and if the lease had not expired at the time of any sale or condemnation, receive a portion of the sale or condemnation price over and above the value of any improvements. In *Lassen* v. *Arizona*

ex rel. Arizona Highway Dept., 385 U. S. 458, 466 (1967), we said that Act "unequivocally demands . . . that the trust receive the full value of lands transferred from it." The majority now construes the Act to authorize a result contrary to the Act's "unequivocal demand" and, accordingly, I dissent.

Syllabus

MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* ELDRIDGE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74–204. Argued October 6, 1975—Decided February 24, 1976

In order to establish initial and continued entitlement to disability benefits under the Social Security Act (Act), a worker must demonstrate that, *inter alia*, he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." The worker bears the continuing burden of showing, by means of "medically acceptable . . . techniques" that his impairment is of such severity that he cannot perform his previous work or any other kind of gainful work. A state agency makes the continuing assessment of the worker's eligibility for benefits, obtaining information from the worker and his sources of medical treatment. The agency may arrange for an independent medical examination to resolve conflicting information. If the agency's tentative assessment of the beneficiary's condition differs from his own, the beneficiary is informed that his benefits may be terminated, is provided a summary of the evidence, and afforded an opportunity to review the agency's evidence. The state agency then makes a final determination, which is reviewed by the Social Security Administration (SSA). If the SSA accepts the agency determination it gives written notification to the beneficiary of the reasons for the decision and of his right to *de novo* state agency reconsideration. Upon acceptance by the SSA, benefits are terminated effective two months after the month in which recovery is found to have occurred. If, after reconsideration by the state agency and SSA review, the decision remains adverse to the recipient, he is notified of his right to an evidentiary hearing before an SSA administrative law judge. If an adverse decision results, the recipient may request discretionary review by the SSA Appeals Council, and finally may obtain judicial review. If it is determined after benefits are terminated that the claimant's disability extended beyond the date of cessation initially established, he is entitled to retroactive payments. Retroactive adjustments are also made for overpayments. A few years after respondent was first awarded disability benefits he received and completed a question-

naire from the monitoring state agency. After considering the information contained therein and obtaining reports from his doctor and an independent medical consultant, the agency wrote respondent that it had tentatively determined that his disability had ceased in May 1972 and advised him that he might request a reasonable time to furnish additional information. In a reply letter respondent disputed one characterization of his medical condition and indicated that the agency had enough evidence to establish his disability. The agency then made its final determination reaffirming its tentative decision. This determination was accepted by the SSA, which notified respondent in July that his benefits would end after that month and that he had a right to state agency reconsideration within six months. Instead of requesting such reconsideration respondent brought this action challenging the constitutionality of the procedures for terminating disability benefits and seeking reinstatement of benefits pending a hearing. The District Court, relying in part on *Goldberg* v. *Kelly*, 397 U. S. 254, held that the termination procedures violated procedural due process and concluded that prior to termination of benefits respondent was entitled to an evidentiary hearing of the type provided welfare beneficiaries under Title IV of the Act. The Court of Appeals affirmed. Petitioner contends, *inter alia*, that the District Court is barred from considering respondent's action by *Weinberger* v. *Salfi*, 422 U. S. 749, which held that district courts are precluded from exercising jurisdiction over an action seeking a review of a decision of the Secretary of Health, Education, and Welfare regarding benefits under the Act except as provided in 42 U. S. C. § 405 (g), which grants jurisdiction only to review a "final" decision of the Secretary made after a hearing to which he was a party. *Held:*

1. The District Court had jurisdiction over respondent's constitutional claim, since the denial of his request for benefits was a final decision with respect to that claim for purposes of § 405 (g) jurisdiction. Pp. 326–332.

(a) The § 405 (g) finality requirement consists of the waivable requirement that the administrative remedies prescribed by the Secretary be exhausted and the nonwaivable requirement that a claim for benefits shall have been presented to the Secretary. Respondent's answers to the questionnaire and his letter to the state agency specifically presented the claim that his benefits should not be terminated because he was still disabled, and thus satisfied the nonwaivable requirement. Pp. 328–330.

(b) Although respondent concededly did not exhaust the Secretary's internal-review procedures and ordinarily only the Secretary has the power to waive exhaustion, this is a case where the claimant's interest in having a particular issue promptly resolved is so great that deference to the Secretary's judgment is inappropriate. The facts that respondent's constitutional challenge was collateral to his substantive claim of entitlement and that (contrary to the situation in *Salfi*) he colorably claimed that an erroneous termination would damage him in a way not compensable through retroactive payments warrant the conclusion that the denial of his claim to continued benefits was a sufficiently "final decision" with respect to his constitutional claim to satisfy the statutory exhaustion requirement. Pp. 330–332.

2. An evidentiary hearing is not required prior to the termination of Social Security disability payments and the administrative procedures prescribed under the Act fully comport with due process. Pp. 332–349.

(a) "[D]ue process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey* v. *Brewer*, 408 U. S. 471, 481. Resolution of the issue here involving the constitutional sufficiency of administrative procedures prior to the initial termination of benefits and pending review, requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. Pp. 332–335.

(b) The private interest that will be adversely affected by an erroneous termination of benefits is likely to be less in the case of a disabled worker than in the case of a welfare recipient, like the claimants in *Goldberg, supra*. Eligibility for disability payments is not based on financial need, and although hardship may be imposed upon the erroneously terminated disability recipient, his need is likely less than the welfare recipient. In view of other forms of government assistance available to the terminated disability recipient, there is less reason than in *Goldberg* to depart from the ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action. Pp. 339–343.

(c) The medical assessment of the worker's condition impli-

cates a more sharply focused and easily documented decision than the typical determination of welfare entitlement. The decision whether to discontinue disability benefits will normally turn upon "routine, standard, and unbiased medical reports by physician specialists," *Richardson* v. *Perales*, 402 U. S. 389, 404. In a disability situation the potential value of an evidentiary hearing is thus substantially less than in the welfare context. Pp. 343–345.

(d) Written submissions provide the disability recipient with an effective means of communicating his case to the decisionmaker. The detailed questionnaire identifies with particularity the information relevant to the entitlement decision. Information critical to the decision is derived directly from medical sources. Finally, prior to termination of benefits, the disability recipient or his representative is afforded full access to the information relied on by the state agency, is provided the reasons underlying its tentative assessment, and is given an opportunity to submit additional arguments and evidence. Pp. 345–346.

(e) Requiring an evidentiary hearing upon demand in all cases prior to the termination of disability benefits would entail fiscal and administrative burdens out of proportion to any countervailing benefits The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances, and here where the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action but also assure a right to an evidentiary hearing as well as subsequent judicial review before the denial of his claim becomes final, there is no deprivation of procedural due process. Pp. 347–349.

493 F. 2d 1230, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 349. STEVENS, J., took no part in the consideration or decision of the case.

Solicitor General Bork argued the cause for petitioner. With him on the briefs were *Deputy Solicitor General Jones, Acting Assistant Attorney General Jaffe, Gerald P. Norton, William Kanter,* and *David M. Cohen.*

Donald E. Earls argued the cause for respondent. With him on the briefs was *Carl E. McAfee.**

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

I

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act. 70 Stat. 815, 42 U. S. C. § 423.[1] Respondent Eldridge was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge com-

J. Albert Woll, Laurence Gold, and *Stephen P. Berzon* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging affirmance.

David A. Webster filed a brief for Caroline Williams as *amicus curiae.*

[1] The program is financed by revenues derived from employee and employer payroll taxes. 26 U. S. C. §§ 3101 (a), 3111 (a); 42 U. S. C. § 401 (b). It provides monthly benefits to disabled persons who have worked sufficiently long to have an insured status, and who have had substantial work experience in a specified interval directly preceding the onset of disability. 42 U. S. C. §§ 423 (c)(1)(A) and (B). Benefits also are provided to the worker's dependents under specified circumstances. §§ 402 (b)–(d). When the recipient reaches age 65 his disability benefits are automatically converted to retirement benefits. §§ 416 (i)(2)(D), 423 (a)(1). In fiscal 1974 approximately 3,700,000 persons received assistance under the program. Social Security Administration, The Year in Review 21 (1974).

pleted the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability.[2] The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.

Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional valid-

[2] Eldridge originally was disabled due to chronic anxiety and back strain. He subsequently was found to have diabetes. The tentative determination letter indicated that aid would be terminated because available medical evidence indicated that his diabetes was under control, that there existed no limitations on his back movements which would impose severe functional restrictions, and that he no longer suffered emotional problems that would preclude him from all work for which he was qualified. App. 12–13. In his reply letter he claimed to have arthritis of the spine rather than a strained back.

ity of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability.[3] 361 F. Supp. 520 (WD Va. 1973). The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. In support of his contention that due process requires a pretermination hearing, Eldridge relied exclusively upon this Court's decision in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), which established a right to an "evidentiary hearing" prior to termination of welfare benefits.[4] The Secretary contended that *Goldberg* was not controlling since eligibility for disability benefits, unlike eligibility for welfare benefits, is not based on financial need and since issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence.

The District Court concluded that the administrative procedures pursuant to which the Secretary had terminated Eldridge's benefits abridged his right to procedural

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[3] The District Court ordered reinstatement of Eldridge's benefits pending its final disposition on the merits.

[4] In *Goldberg* the Court held that the pretermination hearing must include the following elements: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decisionmaker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on. 397 U. S., at 266–271. In this opinion the term "evidentiary hearing" refers to a hearing generally of the type required in *Goldberg*.

due process. The court viewed the interest of the disability recipient in uninterrupted benefits as indistinguishable from that of the welfare recipient in *Goldberg*. It further noted that decisions subsequent to *Goldberg* demonstrated that the due process requirement of pretermination hearings is not limited to situations involving the deprivation of vital necessities. See *Fuentes* v. *Shevin*, 407 U. S. 67, 88–89 (1972); *Bell* v. *Burson*, 402 U. S. 535, 539 (1971). Reasoning that disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence, the District Court held that prior to termination of benefits Eldridge had to be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act. 361 F. Supp., at 528.[5] Relying entirely upon the District Court's opinion, the Court of Appeals for the Fourth Circuit affirmed the injunction barring termination of Eldridge's benefits prior to an evidentiary hearing. 493 F. 2d 1230 (1974).[6] We reverse.

II

At the outset we are confronted by a question as to whether the District Court had jurisdiction over this suit. The Secretary contends that our decision last Term in *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), bars the District Court from considering Eldridge's action. *Salfi* was an action challenging the Social Security Act's

[5] The HEW regulations direct that each state plan under the federal categorical assistance programs must provide for pretermination hearings containing specified procedural safeguards, which include all of the *Goldberg* requirements. See 45 CFR § 205.10 (a) (1975); n. 4, *supra*.

[6] The Court of Appeals for the Fifth Circuit, simply noting that the issue had been correctly decided by the District Court in this case, reached the same conclusion in *Williams* v. *Weinberger*, 494 F. 2d 1191 (1974), cert. pending, No. 74–205.

duration-of-relationship eligibility requirements for surviving wives and stepchildren of deceased wage earners. We there held that 42 U. S. C. § 405 (h)[7] precludes federal-question jurisdiction in an action challenging denial of claimed benefits. The only avenue for judicial review is 42 U. S. C. § 405 (g), which requires exhaustion of the administrative remedies provided under the Act as a jurisdictional prerequisite.

Section 405 (g) in part provides:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." [8]

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[7] Title 42 U. S. C. § 405 (h) provides in full:

"(h) Finality of Secretary's decision.

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

[8] Section 405 (g) further provides:

"Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . ."

On its face § 405 (g) thus bars judicial review of any denial of a claim of disability benefits until after a "final decision" by the Secretary after a "hearing." It is uncontested that Eldridge could have obtained full administrative review of the termination of his benefits, yet failed even to seek reconsideration of the initial determination. Since the Secretary has not "waived" the finality requirement as he had in *Salfi, supra,* at 767, he concludes that Eldridge cannot properly invoke § 405 (g) as a basis for jurisdiction. We disagree.

Salfi identified several conditions which must be satisfied in order to obtain judicial review under § 405 (g). Of these, the requirement that there be a final decision by the Secretary after a hearing was regarded as "central to the requisite grant of subject-matter jurisdiction . . . ." 422 U. S., at 764.[9] Implicit in *Salfi,* however, is the principle that this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

[9] The other two conditions are (1) that the civil action be commenced within 60 days after the mailing of notice of such decision, or within such additional time as the Secretary may permit, and (2) that the action be filed in an appropriate district court. These two requirements specify a statute of limitations and appropriate venue, and are waivable by the parties. *Salfi,* 422 U. S., at 763–764. As in *Salfi* no question as to whether Eldridge satisfied these requirements was timely raised below, see Fed. Rules Civ. Proc. 8 (c), 12 (h) (1), and they need not be considered here.

That this second requirement is an essential and distinct precondition for § 405 (g) jurisdiction is evident from the different conclusions that we reached in *Salfi* with respect to the named appellees and the unnamed members of the class. As to the latter the complaint was found to be jurisdictionally deficient since it "contain[ed] no allegations that they have even filed an application with the Secretary . . . ." 422 U. S., at 764. With respect to the named appellees, however, we concluded that the complaint was sufficient since it alleged that they had "fully presented their claims for benefits 'to their district Social Security Office and, upon denial, to the Regional Office for reconsideration.'" *Id.*, at 764–765. Eldridge has fulfilled this crucial prerequisite. Through his answers to the state agency questionnaire, and his letter in response to the tentative determination that his disability had ceased, he specifically presented the claim that his benefits should not be terminated because he was still disabled. This claim was denied by the state agency and its decision was accepted by the SSA.

The fact that Eldridge failed to raise with the Secretary his constitutional claim to a pretermination hearing is not controlling.[10] As construed in *Salfi*, § 405 (g) requires only that there be a "final decision" by the Secretary with respect to the claim of entitlement to benefits. Indeed, the named appellees in *Salfi* did not present their constitutional claim to the Secretary. *Weinberger* v. *Salfi*, O. T. 1974, No. 74–214, App. 11, 17–21. The situation here is not identical to *Salfi*, for, while the

[10] If Eldridge had exhausted the full set of available administrative review procedures, failure to have raised his constitutional claim would not bar him from asserting it later in a district court. Cf. *Flemming* v. *Nestor*, 363 U. S. 603, 607 (1960).

Secretary had no power to amend the statute alleged to be unconstitutional in that case, he does have authority to determine the timing and content of the procedures challenged here. 42 U. S. C. § 405 (a). We do not, however, regard this difference as significant. It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge.

As the nonwaivable jurisdictional element was satisfied, we next consider the waivable element. The question is whether the denial of Eldridge's claim to continued benefits was a sufficiently "final" decision with respect to his constitutional claim to satisfy the statutory exhaustion requirement. Eldridge concedes that he did not exhaust the full set of internal-review procedures provided by the Secretary. See 20 CFR §§ 404.910, 404.916, 404.940 (1975). As *Salfi* recognized, the Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted either because the internal needs of the agency are fulfilled or because the relief that is sought is beyond his power to confer. *Salfi* suggested that under §405 (g) the power to determine when finality has occurred ordinarily rests with the Secretary since ultimate responsibility for the integrity of the administrative program is his. But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. This is such a case.

Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement. Moreover, there

is a crucial distinction between the nature of the constitutional claim asserted here and that raised in *Salfi*. A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 156 (1974). In light of the Court's prior decisions, see, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments.[11] Thus, unlike the situation in *Salfi*, denying Eldridge's substantive

[11] Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied. The role these factors may play is illustrated by the intensely "practical" approach which the Court has adopted, *Cohen* v. *Beneficial Ind. Loan Corp.*, 337 U. S. 541, 546 (1949), when applying the finality requirements of 28 U. S. C. § 1291, which grants jurisdiction to courts of appeals to review all "final decisions" of the district courts, and 28 U. S. C. § 1257, which empowers this Court to review only "final judgments" of state courts. See, *e. g.*, *Harris* v. *Washington*, 404 U. S. 55 (1971); *Construction Laborers* v. *Curry*, 371 U. S. 542, 549–550 (1963); *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S. 555, 557–558 (1963); *Cohen* v. *Beneficial Ind. Loan Corp.*, *supra*, at 545–546. To be sure, certain of the policy considerations implicated in §§ 1257 and 1291 cases are different from those that are relevant here. Compare *Construction Laborers*, *supra*, at 550; *Mercantile Nat. Bank*, *supra*, at 558, with *McKart* v. *United States*, 395 U. S. 185, 193–195 (1969); L. Jaffe, Judicial Control of Administrative Action 424–426 (1965). But the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.

claim "for other reasons" or upholding it "under other provisions" at the post-termination stage, 422 U. S., at 762, would not answer his constitutional challenge.

We conclude that the denial of Eldridge's request for benefits constitutes a final decision for purposes of § 405 (g) jurisdiction over his constitutional claim. We now proceed to the merits of that claim.[12]

III

A

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, *e. g., Richardson* v. *Belcher,* 404 U. S. 78, 80–81 (1971); *Richardson* v. *Perales,* 402 U. S. 389, 401–402 (1971); *Flemming* v. *Nestor,* 363 U. S. 603, 611 (1960), that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. Cf. *Arnett* v. *Kennedy,* 416 U. S. 134, 166 (POWELL, J., concurring in part) (1974); *Board of Regents* v. *Roth,* 408 U. S. 564, 576–578 (1972); *Bell* v. *Burson,* 402 U. S., at 539; *Goldberg* v. *Kelly,* 397 U. S., at 261–262. Rather, the Secretary contends that the existing administrative procedures, detailed below, provide all the proc-

[12] Given our conclusion that jurisdiction in the District Court was proper under § 405 (g), we find it unnecessary to consider Eldridge's contention that notwithstanding § 405 (h) there was jurisdiction over his claim under the mandamus statute, 28 U. S. C. § 1361, or the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*

ess that is constitutionally due before a recipient can be deprived of that interest.

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff* v. *McDonnell*, 418 U. S. 539, 557–558 (1974). See, *e. g.*, *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597 (1931). See also *Dent* v. *West Virginia*, 129 U. S. 114, 124–125 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). See *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, *Goldberg* v. *Kelly*, 397 U. S., at 266–271, has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. *Snia-*

dach v. *Family Finance Corp.*, 395 U. S. 337 (1969), involving garnishment of wages, was entirely silent on the matter. In *Fuentes* v. *Shevin*, 407 U. S., at 96–97, the Court said only that in a replevin suit between two private parties the initial determination required something more than an *ex parte* proceeding before a court clerk. Similarly, *Bell* v. *Burson*, *supra*, at 540, held, in the context of the revocation of a state-granted driver's license, that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." See also *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601, 607 (1975). More recently, in *Arnett* v. *Kennedy*, *supra*, we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. 416 U. S., at 142–146.

These decisions underscore the truism that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett* v. *Kennedy*, *supra*, at 167–168 (POWELL, J., concurring in part); *Goldberg* v. *Kelly*, *supra*, at 263–266; *Cafeteria Workers* v. *McElroy*, *supra*, at 895. More precisely, our prior de-

cisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e. g., Goldberg* v. *Kelly, supra,* at 263–271.

We turn first to a description of the procedures for the termination of Social Security disability benefits, and thereafter consider the factors bearing upon the constitutional adequacy of these procedures.

B

The disability insurance program is administered jointly by state and federal agencies. State agencies make the initial determination whether a disability exists, when it began, and when it ceased. 42 U. S. C. § 421 (a).[13] The standards applied and the procedures followed are prescribed by the Secretary, see § 421 (b), who has delegated his responsibilities and powers under the Act to the SSA. See 40 Fed. Reg. 4473 (1975).

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[13] In all but six States the state vocational rehabilitation agency charged with administering the state plan under the Vocational Rehabilitation Act of 1920, 41 Stat. 735, as amended, 29 U. S. C. § 701 *et seq.* (1970 ed., Supp. III), acts as the "state agency" for purposes of the disability insurance program. Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 148 (1974). This assignment of responsibility was intended to encourage rehabilitation contacts for disabled workers and to utilize the well-established relationships of the local rehabilitation agencies with the medical profession. H. R. Rep. No. 1698, 83d Cong., 2d Sess., 23–24 (1954).

In order to establish initial and continued entitlement to disability benefits a worker must demonstrate that he is unable

> "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ." 42 U. S. C. § 423 (d)(1)(A).

To satisfy this test the worker bears a continuing burden of showing, by means of "medically acceptable clinical and laboratory diagnostic techniques," § 423 (d)(3), that he has a physical or mental impairment of such severity that

> "he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." § 423 (d)(2)(A).[14]

The principal reasons for benefits terminations are that the worker is no longer disabled or has returned to work. As Eldridge's benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases.[15]

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[14] Work which "exists in the national economy" is in turn defined as "work which exists in significant numbers either in the region where such individual lives or in several regions of the country." § 423 (d)(2)(A).

[15] Because the continuing-disability investigation concerning whether a claimant has returned to work is usually done directly by the SSA Bureau of Disability Insurance, without any state agency involvement, the administrative procedures prior to the post-termina-

The continuing-eligibility investigation is made by a state agency acting through a "team" consisting of a physician and a nonmedical person trained in disability evaluation. The agency periodically communicates with the disabled worker, usually by mail—in which case he is sent a detailed questionnaire—or by telephone, and requests information concerning his present condition, including current medical restrictions and sources of treatment, and any additional information that he considers relevant to his continued entitlement to benefits. CM § 6705.1; Disability Insurance State Manual (DISM) § 353.3 (TL No. 137, Mar. 5, 1975).[16]

Information regarding the recipient's current condition is also obtained from his sources of medical treatment. DISM § 353.4. If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician.[17] *Ibid.* Whenever the agency's tentative assessment of the beneficiary's condition differs from his

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tion evidentiary hearing differ from those involved in cases of possible medical recovery. They are similar, however, in the important respect that the process relies principally on written communications and there is no provision for an evidentiary hearing prior to the cutoff of benefits. Due to the nature of the relevant inquiry in certain types of cases, such as those involving self-employment and agricultural employment, the SSA office nearest the beneficiary conducts an oral interview of the beneficiary as part of the pretermination process. SSA Claims Manual (CM) § 6705.2 (c).

[16] Information is also requested concerning the recipient's belief as to whether he can return to work, the nature and extent of his employment during the past year, and any vocational services he is receiving.

[17] All medical-source evidence used to establish the absence of continuing disability must be in writing, with the source properly identified. DISM § 353.4C.

own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file.[18] He also may respond in writing and submit additional evidence. *Id.*, § 353.6.

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. 42 U. S. C. § 421 (c); CM §§ 6701 (b), (c).[19] If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek *de novo* reconsideration by the state agency. 20 CFR §§ 404.907, 404.909 (1975).[20] Upon acceptance by the SSA, benefits are terminated effective two months after the month in which medical recovery is found to have occurred. 42 U. S. C. § 423 (a) (1970 ed., Supp. III).

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[18] The disability recipient is not permitted personally to examine the medical reports contained in his file. This restriction is not significant since he is entitled to have any representative of his choice, including a lay friend or family member, examine all medical evidence. CM § 7314. See also 20 CFR § 401.3 (a) (2) (1975). The Secretary informs us that this curious limitation is currently under review.

[19] The SSA may not itself revise the state agency's determination in a manner more favorable to the beneficiary. If, however, it believes that the worker is still disabled, or that the disability lasted longer than determined by the state agency, it may return the file to the agency for further consideration in light of the SSA's views. The agency is free to reaffirm its original assessment.

[20] The reconsideration assessment is initially made by the state agency, but usually not by the same persons who considered the case originally. R. Dixon, Social Security Disability and Mass Justice 32 (1973). Both the recipient and the agency may adduce new evidence.

If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. 20 CFR §§ 404.917, 404.927 (1975). The hearing is nonadversary, and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. § 404.934. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, § 404.945, and finally may obtain judicial review. 42 U. S. C. § 405 (g); 20 CFR § 404.951 (1975).[21]

Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. 42 U. S. C. § 404. Cf. § 423 (b); 20 CFR §§ 404.501, 404.503, 404.504 (1975). If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances. 42 U. S. C. § 404.[22]

C

Despite the elaborate character of the administrative procedures provided by the Secretary, the courts

[21] Unlike all prior levels of review, which are *de novo*, the district court is required to treat findings of fact as conclusive if supported by substantial evidence. 42 U. S. C. § 405 (g).

[22] The Secretary may reduce other payments to which the beneficiary is entitled, or seek the payment of a refund, unless the beneficiary is "without fault" and such adjustment or recovery would defeat the purposes of the Act or be "against equity and good conscience." 42 U. S. C. § 404 (b). See generally 20 CFR §§ 404.501–404.515 (1975).

below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in *Goldberg*, see 397 U. S., at 263–264, the nonprobationary federal employee in *Arnett*, see 416 U. S., at 146, and the wage earner in *Sniadach*. See 395 U. S., at 341–342.[23]

Only in *Goldberg* has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence:

> "The crucial factor in this context—a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U. S., at 264 (emphasis in original).

Eligibility for disability benefits, in contrast, is not based upon financial need.[24] Indeed, it is wholly unrelated to

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[23] This, of course, assumes that an employee whose wages are garnisheed erroneously is subsequently able to recover his back wages.

[24] The level of benefits is determined by the worker's average monthly earnings during the period prior to disability, his age, and other factors not directly related to financial need, specified in 42 U. S. C. § 415 (1970 ed., Supp. III). See § 423 (a)(2).

the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards,[25] tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the "many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force . . . ." *Richardson* v. *Belcher,* 404 U. S., at 85–87 (Douglas, J., dissenting). See Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 9–10, 419–429 (1974) (hereinafter Staff Report).

As *Goldberg* illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process. Cf. *Morrissey* v. *Brewer,* 408 U. S. 471 (1972). The potential deprivation here is generally likely to be less than in *Goldberg,* although the degree of difference can be overstated. As the District Court emphasized, to remain eligible for benefits a recipient must be "unable to engage in substantial gainful activity." 42 U. S. C. § 423; 361 F. Supp., at 523. Thus, in contrast to the discharged federal employee in *Arnett,* there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss.

As we recognized last Term in *Fusari* v. *Steinberg,* 419 U. S. 379, 389 (1975), "the possible length of wrongful deprivation of . . . benefits [also] is an important factor in assessing the impact of official action on the private interests." The Secretary concedes that the delay between

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[25] Workmen's compensation benefits are deducted in part in accordance with a statutory formula. 42 U. S. C. § 424a (1970 ed., Supp. III); 20 CFR § 404.408 (1975); see *Richardson* v. *Belcher,* 404 U. S. 78 (1971).

a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, cf. *id.*, at 383–384, 386, and the typically modest resources of the family unit of the physically disabled worker,[26] the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level.[27] See *Arnett* v. *Kennedy*, 416 U. S.,

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[26] *Amici* cite statistics compiled by the Secretary which indicate that in 1965 the mean income of the family unit of a disabled worker was $3,803, while the median income for the unit was $2,836. The mean liquid assets—*i. e.*, cash, stocks, bonds—of these family units was $4,862; the median was $940. These statistics do not take into account the family unit's nonliquid assets—*i. e.*, automobile, real estate, and the like. Brief for AFL–CIO et al. as *Amici Curiae* App. 4a. See n. 29, *infra*.

[27] *Amici* emphasize that because an identical definition of disability is employed in both the Title II Social Security Program and in the companion welfare system for the disabled, Supplemental Security Income (SSI), compare 42 U. S. C. § 423 (d)(1) with § 1382c (a)(3) (1970 ed., Supp. III), the terminated disability-benefits recipient will be ineligible for the SSI Program. There exist, however, state and local welfare programs which may supplement the worker's income. In addition, the worker's household unit can qualify for food stamps if it meets the financial need requirements. See 7 U. S. C. §§ 2013 (c), 2014 (b); 7 CFR § 271 (1975). Finally, in 1974 480,000 of the approximately 2,000,000 disabled workers receiving Social Security benefits also received SSI benefits. Since fi-

at 169 (POWELL, J., concurring in part); *id.*, at 201–202 (WHITE, J., concurring in part and dissenting in part). In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

D

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. See *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 617 (1974); Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1281 (1975). In order to remain eligible for benefits the disabled worker must demonstrate by means of "medically acceptable clinical and laboratory diagnostic techniques," 42 U. S. C. § 423 (d)(3), that he is unable "to engage in any substantial gainful activity by reason of any *medically determinable* physical or mental impairment . . . ." § 423 (d)(1)(A) (emphasis supplied). In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and

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nancial need is a criterion for eligibility under the SSI program, those disabled workers who are most in need will in the majority of cases be receiving SSI benefits when disability insurance aid is terminated. And, under the SSI program, a pretermination evidentiary hearing is provided, if requested. 42 U. S. C. § 1383 (c) (1970 ed., Supp. III); 20 CFR § 416.1336 (c) (1975); 40 Fed. Reg. 1512 (1975); see Staff Report 346.

veracity often are critical to the decisionmaking process. *Goldberg* noted that in such circumstances "written submissions are a wholly unsatisfactory basis for decision." 397 U. S., at 269.

By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," *Richardson* v. *Perales*, 402 U. S., at 404, concerning a subject whom they have personally examined.[28] In *Richardson* the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." *Id.*, at 405, 407. To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decision-

[28] The decision is not purely a question of the accuracy of a medical diagnosis since the ultimate issue which the state agency must resolve is whether in light of the particular worker's "age, education, and work experience" he cannot "engage in any . . . substantial gainful work which exists in the national economy . . . ." 42 U. S. C. § 423 (d)(2)(A). Yet information concerning each of these worker characteristics is amenable to effective written presentation. The value of an evidentiary hearing, or even a limited oral presentation, to an accurate presentation of those factors to the decisionmaker does not appear substantial. Similarly, resolution of the inquiry as to the types of employment opportunities that exist in the national economy for a physically impaired worker with a particular set of skills would not necessarily be advanced by an evidentiary hearing. Cf. 1 K. Davis, Administrative Law Treatise § 7.06, p. 429 (1958). The statistical information relevant to this judgment is more amenable to written than to oral presentation.

maker, is substantially less in this context than in *Goldberg*.

The decision in *Goldberg* also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to write effectively" and could not afford professional assistance. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decision maker appears to regard as important." 397 U. S., at 269. In the context of the disability-benefits-entitlement assesment the administrative procedures under review here fully answer these objections.

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation. Cf. W. Gellhorn & C. Byse, Administrative Law—Cases and Comments 860–863 (6th ed. 1974).

A further safeguard against mistake is the policy of allowing the disability recipient's representative full ac-

cess to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in *Goldberg*, enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

Despite these carefully structured procedures, *amici* point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6% for appealed reconsideration decisions to an overall reversal rate of only 3.3%.[29] Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since

[29] By focusing solely on the reversal rate for appealed reconsideration determinations *amici* overstate the relevant reversal rate. As we indicated last Term in *Fusari* v. *Steinberg*, 419 U. S. 379, 383 n. 6 (1975), in order fully to assess the reliability and fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits. Here that overall rate is 12.2%. Moreover, about 75% of these reversals occur at the reconsideration stage of the administrative process. Since the median period between a request for reconsideration review and decision is only two months, Brief for AFL–CIO et al. as *Amici Curiae* App. 4a, the deprivation is significantly less than that concomitant to the lengthier delay before an evidentiary hearing. Netting out these reconsideration reversals, the overall reversal rate falls to 3.3%. See Supplemental and Reply Brief for Petitioner 14.

the administrative review system is operated on an open-file basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30% to 40% of the appealed cases in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. Staff Report 238. In this context, the value of reversal rate statistics as one means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

E

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. See Friendly, *supra*, 123 U. Pa. L. Rev., at 1276, 1303.

But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U. S., at 171–172 (Frank-

furter, J., concurring). All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," *Goldberg* v. *Kelly*, 397 U. S., at 268–269 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. See *Arnett* v. *Kennedy*, 416 U. S., at 202 (WHITE, J., concurring in part and dissenting in part). This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. Cf. *Boddie* v. *Connecticut*, 401 U. S. 371, 378 (1971).

We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

For the reasons stated in my dissenting opinion in *Richardson* v. *Wright*, 405 U. S. 208, 212 (1972), I agree with the District Court and the Court of Appeals that, prior to termination of benefits, Eldridge must be af-

forded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act, 42 U. S. C. § 601 *et seq.* See *Goldberg* v. *Kelly,* 397 U. S. 254 (1970). I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benfits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed. Tr. of Oral Arg. 39, 47–48. Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.

Syllabus

DE CANAS ET AL. *v.* BICA ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 74–882. Argued December 16, 1975—Decided February 25, 1976

Section 2805 (a) of the California Labor Code, which prohibits an employer from knowingly employing an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers, *held* not to be unconstitutional as a regulation of immigration or as being pre-empted under the Supremacy Clause by the Immigration and Nationality Act (INA). Pp. 354–365.

(a) Standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration. Even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve. Pp. 354–356.

(b) Pre-emption on the basis of congressional intent to "occupy the field" and thereby invalidate even harmonious state regulation is not required in this case either because "the nature of the regulated subject matter permits no other conclusion" or because "Congress has unmistakably so ordained" that result. *Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 142. Section 2805 (a) is clearly within a State's police power to regulate the employment relationship so as to protect workers within the State, and it will not be presumed that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by § 2805 (a) in a manner consistent with pertinent federal laws, absent any showing of such intent either in the INA's wording or legislative history or in its comprehensive scheme for regulating immigration and naturalization. Rather than there being evidence that Congress "has unmistakably . . . ordained" exclusivity of federal regulation in the field of employment of illegal aliens, the Farm Labor Contractor Registration Act, whose provisions prohibiting farm labor contractors from employing illegal aliens were enacted to supplement state action, is persuasive evidence that the INA should not be taken as legislation expressing Congress' judgment to have uniform federal regu-

lations in matters affecting employment of illegal aliens, and therefore barring state legislation such as § 2805 (a). *Hines* v. *Davidowitz*, 312 U. S. 52; *Pennsylvania* v. *Nelson*, 350 U. S. 497, distinguished. Pp. 356–363.

(c) It is for the California courts to construe § 2805 (a), and then to decide in the first instance whether and to what extent § 2805 (a), as construed, is unconstitutional as conflicting with the INA or other federal laws or regulations. Pp. 363–365.

40 Cal. App. 3d 976, 115 Cal. Rptr. 444, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which all Members joined except STEVENS, J., who took no part in the consideration or decision of the case.

Robert S. Catz argued the cause for petitioners. With him on the briefs were *Howard S. Scher, Ralph Santiago Abascal, Burton D. Fretz,* and *Robert B. Johnstone.*

William S. Marrs argued the cause for respondents. With him on the brief was *Robert L. Trapp, Jr.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

California Labor Code Ann. § 2805 (a) provides that "[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." [1] The question presented in this case is whether § 2805 (a) is unconstitutional either because it

[1] Section 2805 of the California Labor Code, added by Stats. 1971, p. 2847, c. 1442, § 1, reads in full as follows:

"(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

"(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200) nor more than five hundred dollars ($500) for each offense.

"(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a)."

is an attempt to regulate immigration and naturalization or because it is pre-empted under the Supremacy Clause, Art. VI, cl. 2, of the Constitution, by the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.*, the comprehensive federal statutory scheme for regulation of immigration and naturalization.

Petitioners, who are migrant farmworkers, brought this action pursuant to § 2805 (c) against respondent farm labor contractors in California Superior Court. The complaint alleged that respondents had refused petitioners continued employment due to a surplus of labor resulting from respondents' knowing employment, in violation of § 2805 (a), of aliens not lawfully admitted to residence in the United States. Petitioners sought reinstatement and a permanent injunction against respondents' willful employment of illegal aliens.[2] The Superior Court, in an unreported opinion, dismissed the complaint, holding "that Labor Code 2805 is unconstitutional . . . [because] [i]t encroaches upon, and interferes with, a comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive power over immigration . . . ." App. 17a. The California Court of Appeal, Second Appellate District, affirmed, 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974). The Court of Appeal held that § 2805 (a) is an attempt to regulate the conditions for admission of foreign nationals, and therefore unconstitutional because, "in the area of immigration and naturalization, congressional power is exclusive."

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[2] We assume, *arguendo*, in this opinion, in referring to "illegal aliens," that the prohibition of § 2805 (a) only applies to aliens who would not be permitted to work in the United States under pertinent federal laws and regulations. Whether that is the correct construction of the statute is an issue that will remain open for determination by the state courts on remand. See Part III, *infra*.

Id., at 979, 115 Cal. Rptr., at 446.[3] The Court of Appeal further indicated that state regulatory power over this subject matter was foreclosed when Congress, "as an incident of national sovereignty," enacted the INA as a comprehensive scheme governing all aspects of immigration and naturalization, including the employment of aliens, and "specifically and intentionally declined to add sanctions on employers to its control mechanism." *Ibid.*[4] The Supreme Court of California denied review. We granted certiorari, 422 U. S. 1040 (1975). We reverse.

I

Power to regulate immigration is unquestionably exclusively a federal power. See, *e. g.*, *Passenger Cases*, 7 How. 283 (1849); *Henderson* v. *Mayor of New York*, 92 U. S. 259 (1876); *Chy Lung* v. *Freeman*, 92 U. S.

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[3] Insofar as the determination of § 2805's objective is a matter of state law, the Court of Appeal's view that § 2805 (a) is an attempt to regulate the conditions for admission of foreign nationals may be questioned. Another division of the Court of Appeal has said that "the section is not aimed at immigration control or regulation but seeks to aid California residents in obtaining jobs . . . ." *Dolores Canning Co.* v. *Howard*, 40 Cal. App. 3d 673, 686, 115 Cal. Rptr. 435, 442 (1974). *Dolores Canning* also invalidated § 2805 (a), however, relying, *inter alia*, on *Guss* v. *Utah Labor Board*, 353 U. S. 1 (1957), and *San Diego Unions* v. *Garmon*, 359 U. S. 236 (1959), and stating that the statute "does or could affect immigration in several ways." 40 Cal. App. 3d, at 686, 115 Cal. Rptr., at 442–443.

It is also uncertain that the Court of Appeal viewed § 2805 as a constitutionally proscribed state regulation of immigration that would be invalid even absent federal legislation; the court's discussion of the INA seems to imply that the court assumed that Congress could clearly authorize state legislation such as § 2805, even if it had not yet done so.

[4] H. R. 8713, now pending in Congress, would amend 8 U. S. C. § 1324 to provide a penalty for knowingly employing an alien not lawfully admitted to the United States.

275 (1876); *Fong Yue Ting* v. *United States,* 149 U. S. 698 (1893). But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised. For example, *Takahashi* v. *Fish & Game Comm'n,* 334 U. S. 410, 415–422 (1948), and *Graham* v. *Richardson,* 403 U. S. 365, 372–373 (1971), cited a line of cases that upheld certain discriminatory state treatment of aliens lawfully within the United States. Although the "doctrinal foundations" of the cited cases, which generally arose under the Equal Protection Clause, *e. g., Clarke* v. *Deckebach,* 274 U. S. 392 (1927), "were undermined in *Takahashi,*" see *In re Griffiths,* 413 U. S. 717, 718–722 (1973); *Graham* v. *Richardson, supra,* at 372–375, they remain authority that, standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain. Indeed, there would have been no need, in cases such as *Graham, Takahashi,* or *Hines* v. *Davidowitz,* 312 U. S. 52 (1941), even to discuss the relevant congressional enactments in finding pre-emption of state regulation if all state regulation of aliens was *ipso facto* regulation of immigration, for the existence *vel non* of federal regulation is wholly irrelevant if the Constitution of its own force requires pre-emption of such state regulation. In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby be-

come a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve. Thus, absent congressional action, § 2805 would not be an invalid state incursion on federal power.

II

Even when the Constitution does not itself commit exclusive power to regulate a particular field to the Federal Government, there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause. As we stated in *Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 142 (1963):

> "[F]ederal regulation . . . should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

In this case, we cannot conclude that pre-emption is required either because "the nature of the . . . subject matter [regulation of employment of illegal aliens] permits no other conclusion," or because "Congress has unmistakably so ordained" that result.

States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples. California's attempt in § 2805 (a) to prohibit the knowing employment by California employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation. Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; accept-

ance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico. In attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, § 2805 (a) focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils.

Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation. But we will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by § 2805 (a) in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was " 'the clear and manifest purpose of Congress' " would justify that conclusion. *Florida Lime & Avocado Growers* v. *Paul*, *supra*, at 146, quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947).[5] Respondents have not made

[5] See also, *e. g.*, *New York Dept. of Social Services* v. *Dublino*, 413 U. S. 405, 413–414 (1973); *Schwartz* v. *Texas*, 344 U. S. 199, 202–203 (1952); *California* v. *Zook*, 336 U. S. 725, 732–733 (1949).

Of course, even absent such a manifestation of congressional intent to "occupy the field," the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties. See Part III, *infra*. However, "conflicting law, absent repealing or exclusivity provisions,

that demonstration. They fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular.[6]

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should be pre-empted . . . 'only to the extent necessary to protect the achievement of the aims of' " the federal law, since "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.' " *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U. S. 117, 127 (1973), quoting *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 361, 357 (1963).

[6] Of course, state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress:

"The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. See *Hines* v. *Davidowitz*, 312 U. S. 52, 66. Under the Constitution the states are granted no such powers; *they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence* of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of *aliens lawfully within* the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 419 (1948) (emphasis supplied).

See also, *e. g.*, *Graham* v. *Richardson*, 403 U. S. 365, 376–380 (1971); *Truax* v. *Raich*, 239 U. S. 33, 41–42 (1915); cf. also *Sugarman* v. *Dougall*, 413 U. S. 634, 641–646 (1973); *In re Griffiths*, 413 U. S. 717 (1973). But California Code § 2805 appears to be designed to protect the opportunities of lawfully admitted aliens for obtaining and holding jobs, rather than to add to their burdens. The question whether § 2805 (a) nevertheless in fact imposes burdens bringing it into conflict with the INA is open for inquiry on remand. See Part III, *infra*.

Nor can such intent be derived from the scope and detail of the INA. The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country. The comprehensiveness of the INA scheme for regulation of immigration and naturalization, without more, cannot be said to draw in the employment of illegal aliens as "plainly within . . . [that] central aim of federal regulation." *San Diego Unions* v. *Garmon*, 359 U. S. 236, 244 (1959).[7] This conclusion is buttressed by the fact that comprehensiveness of legislation governing entry and stay of aliens was to be expected in light of the nature and complexity of the subject. As the Court said in another legislative context: "Given the complexity of the matter addressed

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[7] In finding § 2805 pre-empted by the INA, the Court of Appeal cited *Guss* v. *Utah Labor Board*, 353 U. S. 1 (1957), and *San Diego Unions* v. *Garmon*, 353 U. S. 26 (1957), and 359 U. S. 236 (1959) as controlling authority. Reliance upon those decisions was misplaced. Those decisions involved labor management disputes over conduct expressly committed to the National Labor Relations Board to regulate, but concerning which the Board had declined to assert jurisdiction; the Board had not ceded jurisdiction of such regulation to the States, as it was empowered to do. 353 U. S., at 6–9. This Court rejected the argument that the inaction of the NLRB left the States free to regulate the conduct. Section 10 (a) of the National Labor Relations Act, 29 U. S. C. § 160 (a), expressly excluded state regulation of the disputed conduct unless the Board entered into an agreement with the State ceding regulatory authority. The Court held in that circumstance that "[t]o leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *San Diego Unions* v. *Garmon*, 359 U. S., at 244. *Guss* and *Garmon* recognize, therefore, that in areas that Congress decides require national uniformity of regulation, Congress may exercise power to exclude *any* state regulation, even if harmonious. But nothing remotely resembling the NLRA scheme is to be found in the INA.

by Congress . . . , a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent." *New York Dept. of Social Services* v. *Dublino*, 413 U. S. 405, 415 (1973).[8]

It is true that a proviso to 8 U. S. C. § 1324, making it a felony to harbor illegal entrants, provides that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." But this is at best evidence of a peripheral concern with employment of illegal entrants,[9] and *San Diego Unions* v. *Garmon*, *supra*, at 243, admonished that "due regard for the presuppositions of our

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[8] "Little aid can be derived from the vague and illusory but often repeated formula that Congress 'by occupying the field' has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history." *Hines* v. *Davidowitz*, 312 U. S. 52, 78–79 (1941) (Stone, J., dissenting).

[9] A construction of the proviso as not immunizing an employer who knowingly employs illegal aliens may be possible, and we imply no view upon the question. As will appear *infra*, other federal law that criminalizes knowing employment of illegal aliens in the agricultural field sanctions "appropriate" state laws criminalizing the same conduct. Accordingly, neither the proviso to 8 U. S. C. § 1324 (a) nor Congress' failure to enact general laws criminalizing knowing employment of illegal aliens justifies an inference of congressional intent to pre-empt all state regulation in the employment area. Indeed, Congress' failure to enact such general sanctions reinforces the inference that may be drawn from other congressional action that Congress believes this problem does not yet require uniform national rules and is appropriately addressed by the States as a local matter. The cited statutory provisions would, in any event, be relevant on remand in the analysis of actual or potential conflicts between § 2805 and federal law. See also 8 U. S. C. §§ 1101 (a)(15)(H), 1182 (a)(14), 1321–1330.

embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the [federal regulation] . . . ."

Finally, rather than evidence that Congress "has unmistakably . . . ordained" exclusivity of federal regulation in this field, there is evidence in the form of the 1974 amendments to the Farm Labor Contractor Registration Act, 88 Stat. 1652, 7 U. S. C. § 2041 *et seq.* (1970 ed., Supp. IV), that Congress intends that States may, to the extent consistent with federal law, regulate the employment of illegal aliens. Section 2044 (b) authorizes revocation of the certificate of registration of any farm labor contractor found to have employed "an alien not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment." Section 2045 (f) prohibits farm labor contractors from employing "an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment." [10] Of particular significance to our in-

[10] Title 7 U. S. C. § 2044 (b) (6) (1970 ed., Supp. IV) provides:

"Upon notice and hearing in accordance with regulations prescribed by him, the Secretary may refuse to issue, and may suspend, revoke, or refuse to renew a certificate of registration to any farm labor contractor if he finds that such contractor—

. . . . . .

"(6) has recruited, employed, or utilized with knowledge, the services of any person, who is an alien not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment . . . ."

Title 7 U. S. C. § 2045 (f) (1970 ed., Supp. IV) provides:

"Every farm labor contractor shall—

. . . . . .

"(f) refrain from recruiting, employing, or utilizing, with knowl-

quiry is the further provision that "[t]his chapter and the provisions contained herein are *intended to supplement State action* and compliance with this chapter shall not excuse anyone from compliance with *appropriate State law and regulation.*" 7 U. S. C. § 2051 (emphasis supplied). Although concerned only with agricultural employment, the Farm Labor Contractor Registration Act is thus persuasive evidence that the INA should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations in matters affecting employment of illegal aliens, and therefore barring state legislation such as § 2805 (a).[11]

Hines v. *Davidowitz*, 312 U. S. 52 (1941), and *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956), upon which respondents rely, are fully consistent with this conclusion. *Hines* held that Pennsylvania's Alien Registration Act of 1939 was pre-empted by the federal Alien Registration Act. *Nelson* held that the Pennsylvania Sedition Act was pre-empted by the federal Smith Act. Although both cases relied on the comprehensiveness of the federal regulatory schemes in finding pre-emptive intent, both federal statutes were in the specific field which the States were attempting to regulate, while here there is no indication that Congress intended to preclude state law in the area of employment regulation. And *Nelson* stated that even in the face of the general immigration laws, States would have the right "to enforce their sedition laws at times when the Federal Government has not

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edge, the services of any person, who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment . . . ."

Violations of the Act are made criminal, and aggrieved persons are accorded the right to civil relief.

[11] The Solicitor General, in his Memorandum for the United States as *Amicus Curiae* 4 n. 4, concedes that the "Act contemplates some limited room for state law," but argues that § 2805 is not "appropriate" in light of various alleged conflicts with federal regulation.

occupied the field and is not protecting the entire country from seditious conduct." 350 U. S., at 500. Moreover, in neither *Hines* nor *Nelson* was there affirmative evidence, as here, that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law. Furthermore, to the extent those cases were based on the predominance of federal interest in the fields of immigration and foreign affairs, there would not appear to be a similar federal interest in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers, and only with respect to individuals whom the Federal Government has already declared cannot work in this country. Finally, the Pennsylvania statutes in *Hines* and *Nelson* imposed burdens on aliens lawfully within the country that created conflicts with various federal laws.

III

There remains the question whether, although the INA contemplates some room for state legislation, § 2805 (a) is nevertheless unconstitutional because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the INA. *Hines* v. *Davidowitz, supra,* at 67; *Florida Lime & Avocado Growers* v. *Paul,* 373 U. S., at 141. We do not think that we can address that inquiry upon the record before us. The Court of Appeal did not reach the question in light of its decision, today reversed, that Congress had completely barred state action in the field of employment of illegal aliens. Accordingly, there are questions of construction of § 2805 (a) to be settled by the California courts before a determination is appropriate whether, as construed, § 2805 (a) "can be enforced without impairing the federal superintendence of the field" covered by the INA. 373 U. S., at 142.

For example, § 2805 (a) requires that to be employed an alien must be "entitled to lawful residence." In its application, does the statute prevent employment of aliens who, although "not entitled to lawful residence in the United States," may under federal law be permitted to work here? Petitioners conceded at oral argument that, on its face, § 2805 (a) would apply to such aliens and thus unconstitutionally conflict with federal law. They point, however, to the limiting construction given § 2805 (a) in administrative regulations promulgated by the California Director of Industrial Relations. California Administrative Code, Title 8, part 1, c. 8, art. 1, § 16209 (1972), defines an alien "entitled to lawful residence" as follows: "An alien entitled to lawful residence shall mean any non-citizen of the United States who is in possession of a Form I–151, Alien Registration Receipt Card, or any other document issued by the United States Immigration and Naturalization Service which authorizes him to work." *Dolores Canning Co.* v. *Howard*, 40 Cal. App. 3d 673, 677 n. 3, 115 Cal. Rptr, 435, 436 n. 3 (1974). Whether these regulations were before the Superior Court in this case does not appear, and the Court of Appeal found § 2805 (a) unconstitutional without addressing whether it conflicts with federal law.[12] Ob-

[12] It would appear the regulations were not before the Superior Court since that court held § 2805 (a) to be in conflict with federal immigration laws, stating:

"[T]he statute forbids hiring of an 'alien who is not entitled to lawful residence in the United States,' and under the U. S. Immigration laws, there are many such aliens who may work in the United States, under certain classifications, and Labor Code 2805 is in direct conflict with Federal Law." App. 18a.

Dolores Canning Co. v. *Howard* quotes the definition in a footnote, 40 Cal. App. 3d, at 677 n. 3, 115 Cal. Rptr., at 436 n. 3, but the opinion states nothing respecting its significance in construing § 2805 (a).

viously it is for the California courts to decide the effect of these administrative regulations in construing § 2805 (a), and thus to decide in the first instance whether and to what extent, see n. 5, *supra*, § 2805 as construed would conflict with the INA or other federal laws or regulations. It suffices that this Court decide at this time that the Court of Appeal erred in holding that Congress in the INA precluded any state authority to regulate the employment of illegal aliens.

The judgment of the Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

GREAT ATLANTIC & PACIFIC TEA CO., INC. *v.* COTTRELL, HEALTH OFFICER OF MISSISSIPPI

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 74–1148. Argued December 1, 1975—Decided February 25, 1976

A Mississippi regulation provides that milk and milk products from another State may be sold in Mississippi only if the other State accepts milk or milk products produced and processed in Mississippi on a reciprocal basis. Appellant's application for a permit to distribute for sale at its retail outlets in Mississippi milk and milk products from its Louisiana processing plant was denied solely on the ground that Louisiana had not signed a reciprocity agreement with Mississippi as required by the regulation. Appellant then brought suit claiming that the regulation violated the Commerce Clause, but a three-judge District Court upheld the regulation as a valid exercise of state police powers, even though it incidentally burdened interstate commerce. *Held:* The mandatory character of the regulation's reciprocity requirement unduly burdens the free flow of interstate commerce in violation of the Commerce Clause and cannot be justified as a permissible exercise of any state power. Pp. 370–381.

(a) Only state interests of substantial importance can save the regulation in the face of its devastating effect upon the free flow of interstate milk by in practical effect, though not in absolute terms, excluding from Mississippi wholesome milk produced in Louisiana. Cf. *Dean Milk Co.* v. *Madison*, 340 U. S. 349. Pp. 372–375.

(b) The reciprocity requirement cannot be justified as serving Mississippi's vital interests in maintaining the State's health standards, for even if Louisiana's standards were lower than Mississippi's, such requirement if met permits Louisiana milk to be admitted to Mississippi if Louisiana enters into a reciprocity agreement. And even if the requirement enables Mississippi to assure itself that the reciprocating State's health standards are the "substantial equivalent" of its own, Mississippi has available for accomplishing that objective the alternative, substantially less burdensome on commerce, of applying its own inspection

standards to milk shipments from a nonreciprocating State. Pp. 375–378.

(c) Nor can the reciprocity requirement be justified as an economic "free trade" measure, since it is "precisely the kind of hindrance to the introduction of milk from other states . . . condemned as an 'unreasonable clog upon the mobility of commerce'" and "'hostile in conception as well as burdensome in result.'" *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361, 377. Pp. 378–381.

383 F. Supp. 569, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which all Members joined except STEVENS, J., who took no part in the consideration or decision of the case.

Walter W. Christy argued the cause for appellant. On the brief was *Samuel Lang.*

Heber Ladner, Jr., argued the cause for appellee. With him on the brief was *A. F. Summer*, Attorney General of Mississippi, and *Hugo Newcomb*, Assistant Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 11 of Mississippi's Regulation Governing the Production and Sale of Milk and Milk Products in Mississippi, promulgated by the Mississippi State Board of Health (1967), provides, among other things, that "[m]ilk and milk products from . . . [another State] may be sold in . . . Mississippi . . . provided . . . that the regulatory agency [of the other State that] has jurisdiction accepts Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis." [1]

[1] Section 11 provides in full text:

"Milk and milk products from points beyond the limits of routine inspection of the state of Mississippi or its police jurisdiction, may be sold in the state of Mississippi or its police jurisdiction, provided

The question presented by this case is whether Mississippi, consistently with the Commerce Clause, Art. I, § 8, cl. 3, of the Constitution,[2] may, pursuant to this regulation, constitutionally deny a Louisiana milk producer the right to sell in Mississippi milk satisfying Mississippi's health standards solely because the State of Louisiana has not signed a reciprocity agreement with the State of Mississippi as required by the regulation. A three-judge District Court in the Southern District of Mississippi rejected appellant's Commerce Clause challenge, holding that "[s]ection 11 is within the permissible limits of state police powers even though it incidentally or indirectly involves or burdens interstate commerce." 383 F. Supp. 569, 575 (1974). We noted probable jurisdiction of appellant's appeal, 421 U. S. 961 (1975). We reverse.[3]

I

Appellant, The Great Atlantic & Pacific Tea Co., Inc. (A&P), a Maryland corporation, owns and operates 38 outlets in Mississippi that engage in the retail sale

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they are produced, pasteurized, and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U. S. Public Health Service, and Provided further, that the regulatory agency who [*sic*] has jurisdiction accepts Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis. The health authority is authorized to require and conduct laboratory analysis and investigations to determine if the milk and milk products are in compliance with this Regulation." Record 102.

[2] The Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, provides: "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[3] Appellant also alleged a claim for relief under the Equal Protection Clause of the Fourteenth Amendment. In view of our conclusion we have no occasion to address that claim.

of milk and milk products. A&P also operates at Kentwood, La., a plant for the processing of raw milk into milk and milk products for delivery to its retail outlets. A&P invested over $1 million in the Kentwood processing facilities, intending that part of the dairy products produced at the facility would supply its retail outlets in Mississippi. However, A&P's application on August 28, 1972, to the Mississippi State Board of Health for a permit to distribute the products from its Kentwood facility for sale in Mississippi was denied by the Board because A&P failed to submit the reciprocal agreement between Louisiana and Mississippi required by § 11.[4] Appellant thereupon brought this action.

Evidence was stipulated before the District Court which conclusively established that the milk produced at the Kentwood plant fully complied with the requirements of § 11 in all respects save the required reciprocity agreement. The Kentwood plant had received milk sanitation-compliance ratings in excess of 90% in all respects following each inspection by Louisiana officials. These sanitation-compliance ratings were published in the Sanitation Compliance and Enforcement Ratings of Interstate Milk Shippers, a list compiled by the Public Health Service and the Food and Drug Administration of the United States Department of Health, Education, and Welfare (HEW), which includes only processors receiving compliance ratings from state officials who have been certified by the Public Health Serv-

[4] A&P attempted but failed to obtain the required reciprocity agreement from the Louisiana health authorities. It was informed by Louisiana health officials that Louisiana had not entered into a reciprocity agreement with any State, that in the opinion of Louisiana officials processed milk from Mississippi did not meet Louisiana health standards, and that Mississippi-processed milk from plants that met Louisiana standards would be admitted for sale in Louisiana. Record 15.

ice. Further, the parties stipulated that the Supervisor of the Milk Control Program of the Mississippi State Board of Health testified, on the basis of an inspection by Louisiana officials of the Kentwood plant reported on an HEW form, that Kentwood milk would be acceptable in Mississippi as the Louisiana regulations were substantially equivalent to Mississippi's within the meaning of § 11. Thus only the lack of a reciprocity agreement between the two States prevented appellant from marketing its Kentwood milk at its Mississippi retail outlets.[5]

II

Mississippi's answer to appellant's Commerce Clause challenge is that the reciprocity requirement of § 11 is a reasonable exercise of its police power over local affairs, designed to assure the distribution of healthful milk products to the people of its State. We begin our analysis by again emphasizing that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, 330 (1944). And at least since *Cooley* v. *Board of Wardens*, 12 How. 299 (1852), it has been clear that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce

[5] Appellee makes no contention that there are alternative means by which appellant's milk may be judged qualified under Mississippi standards and thereby admitted for sale in the State. Indeed, appellee states that without reciprocity, milk from the Kentwood plant must be subjected to on-site inspection according to Mississippi health standards, and that Mississippi currently makes no provision for out-of-state inspection by Mississippi officials. Brief for Appellee 15–16, n. 1.

Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit*, 329 U. S. 249, 252 (1946). It is no less true, of course, that under our constitutional scheme the States retain "broad power" to legislate protection for their citizens in matters of local concern such as public health, *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 531–532 (1949), and that not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States. *Freeman* v. *Hewit, supra*, at 253; *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 351–352 (1939). Rather, in areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in the absence of congressional guidance is called upon to make "delicate adjustment of the conflicting state and federal claims," *H. P. Hood & Sons, Inc.* v. *Du Mond, supra*, at 553 (Black, J., dissenting), thereby attempting "the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce." *Freeman* v. *Hewit, supra*, at 253. In undertaking this task the Court, if it finds that a challenged exercise of local power serves to further a legitimate local interest but simultaneously burdens interstate commerce, is confronted with a problem of balance:

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly

> excessive in relation to the putative local benefits. *Huron Cement Co.* v. *Detroit*, 362 U. S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970).[6]

Adjudication of Commerce Clause challenges to the validity of local milk regulations burdening interstate milk is not a novel experience for this Court. See, *e. g.*, *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361 (1964); *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951); *H. P. Hood & Sons, Inc.* v. *Du Mond*, *supra*; *Milk Control Board* v. *Eisenberg Farm Products*, *supra*; *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935).

The District Court seems to have concluded that *Dean Milk Co.* v. *Madison*, *supra*, while especially pertinent to a decision upon the validity of the reciprocity provision

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[6] Adjudication entails "emphasis upon the concrete elements of the situation that concerns both state and national interests. The particularities of a local statute touch its special aims and the scope of their fulfillment, the difficulties which it seeks to adjust, the price at which it does so. . . . [P]ractical considerations, however screened by doctrine, underlie resolution of conflicts between state and national power." F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 33–34 (1937).

"[I]t seems clear that those interferences [with interstate commerce] not deemed forbidden are to be sustained . . . because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines." *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 44 (1927) (Stone, J., dissenting).

of § 11, did not require the conclusion that the requirement rendered the section violative of the Commerce Clause. We disagree. *Dean Milk* involved a Madison, Wis., ordinance that forbade the sale of milk in the city unless it had been pasteurized and bottled at an approved plant located within five miles of the center of the city. Although agreeing that sanitary regulation of milk originating in remote areas is a " 'matter . . . which may appropriately be regulated in the interest of the safety, health and well-being of local communities,' " 340 U. S., at 353, the Court held that the Madison ordinance could not withstand challenge under the Commerce Clause, "even in the exercise of [the city's] unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." *Id.,* at 354. Inquiry whether adequate and less burdensome alternatives exist is, of course, important in discharge of the Court's task of "accommodation" of conflicting local and national interests, since any " 'realistic' judgment" whether a given state action "unreasonably" trespasses upon national interests must, of course, consider the "consequences to the state if its action were disallowed." Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1, 22 (1940).

Dean Milk identified as adequate to serve local interests, and yet less burdensome to the flow of interstate commerce, the alternatives of either inspection of the distant plants by city officials, or reliance on milk ratings obtained by officials in localities having standards as high as those of Madison, the enforcement of which could be verified by reliance on the United States Public Health Service's system of checking local ratings. This latter alternative reflected the recommendation of the United States Public Health Service based on § 11 of the

Model Milk Ordinance proposed by the Service, *Dean Milk, supra,* at 355 n. 5, that the local "health officer approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a rating of 90 percent or more on the basis of the Public Health Service rating method." The Illinois producer's milk involved in *Dean Milk* was processed in plants inspected by the public health authorities in Chicago on the basis of the Public Health Service rating method.

The District Court in the instant case acknowledged that "[i]nterestingly enough Section 11 of the Mississippi regulation, but for the reciprocal clause, is identical in every material aspect to Section 11 of the U. S. Public Health Service Ordinance" discussed in *Dean Milk.* 383 F. Supp., at 574. Accordingly, the District Court concluded that § 11 was "free of any constitutional infirmity," "insofar as it follows Section 11 of the U. S. Public Health Service Milk Ordinance." *Id.,* at 575. The District Court held further that the reciprocity clause of Mississippi's § 11—not found in HEW's proposed Model Milk Ordinance § 11—did not constitute a sufficient burden on interstate commerce to violate the Commerce Clause. Mississippi, said the District Court, may constitutionally "enforce its own standards, either through inspections at the source of the processed milk, although such may require out-of-state inspections, or through reciprocal agreements . . ." and "[a]s long as Mississippi mutually exchanges standards of inspection with other states, there can be no burden on interstate trade." 383 F. Supp., at 575. Further, said the District Court, "Mississippi adopted the reciprocity clause to avoid the expense of out-of-state inspections,"

id., at 576, and offers reciprocity to all States without discrimination.

The fallacy in the District Court's reasoning is that it attached insufficient significance to the interference effected by the clause upon the national interest in freedom for the national commerce, and attached too great significance to the state interests purported to be served by the clause. Although not in terms an absolute and universal bar to sales of out-of-state milk, which was the effect of the Madison ordinance invalidated in *Dean Milk*, the barrier of the reciprocity clause to sales of out-of-state milk in Mississippi has in this case also "in practical effect exclude[d] from distribution in [Mississippi] wholesome milk produced . . . in [Louisiana]." 340 U. S., at 354.[7] Only state interests of substantial importance can save § 11 in the face of that devastating effect upon the free flow of interstate milk.

Mississippi's contention that the reciprocity clause serves its vital interests in maintaining the State's health standards borders on the frivolous. The clause clearly does not do so in the sense of furthering Mississippi's established milk quality standards. For, according to appellee, "§ 11 covenants that Mississippi will do the inspections, will certify them, and will accept a standard below that applicable to domestic producers if the forwarding state will do the same." Brief for Appellee 9. Thus, even if Louisiana's standards were lower than Mississippi's, the clause permits Louisiana milk to be admitted to Mississippi if Louisiana enters into a reciprocity agreement. The reciprocity clause thus disserves rather than promotes any higher Mississippi milk quality stand-

[7] The parties stipulated in the District Court that the net annual cost to A&P incurred by its inability to use the product of its Kentwood facility and its consequent reliance on alternative sources of supply was $195,700.

ards. Therefore this is a case where the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U. S., at 142.

Mississippi next argues that the reciprocity clause somehow enables Mississippi to assure itself that the reciprocating State's (here Louisiana's) health standards are the "substantial equivalent" of Mississippi's.[8] But even if this were true, and the premise may be disputed,[9] there are means adequate to serve this interest

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[8] "If Louisiana will not give trust and reliance to Mississippi's conduct of the inspections, then Mississippi is loath to accept the same Louisiana procedures, out of a regard for the health and welfare of her own citizens." Brief for Appellee 11.

[9] A sample reciprocity agreement acceptable to Mississippi is the following:

"AN ACCEPTABLE AGREEMENT TO MISSISSIPPI STATE BOARD OF HEALTH REGARDING RECIPROCITY IN THE MOVEMENT OF GRADE A MILK AND MILK PRODUCTS IN INTERSTATE SHIPMENT

"1. Each state shall be responsible for inspecting, sampling, and enforcing its regulations that apply to the dairies and milk plants located in its respective state, provided each state's regulation is substantially equivalent.

"2. The appropriate state regulatory agency shall certify to the receiving state agency that the dairies and plants involved in interstate shipment hold a valid Grade A permit from said agency.

"3. Milk and milk products received into each state shall meet the chemical and bacteriological standards, labeling and delivery vehicle requirements of the receiving state.

"4. Public health sanitation ratings shall be made by certified rating officials of the respective states of any milk supply involved in interstate shipment. The ratings shall be submitted to the FDA–PHS to be included and maintained on the Interstate Milk Shippers List and published by the FDA–PHS so that they can make spot check ratings of the supplies involved to determine if satisfactory

that are substantially less burdensome on commerce, and, therefore, *Dean Milk* teaches that the burden of the mandatory reciprocity clause cannot be justified in view of the character of the local interest and these available methods of protecting it. In the absence of adequate assurance that the standards of a sister State, either as constituted or as applied, are substantially equivalent to its own, Mississippi has the obvious alternative of applying its own standards of inspection to shipments of milk from a nonreciprocating State.[10] *Dean Milk*, 340 U. S., at 355, expressly supported the adequacy of this alternative: "[S]uch inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors."[11] Cf. *Evansville-Vanderburgh Airport Au-*

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sanitation surveillance is being carried out by the respective state. All sanitation ratings shall be 90% in compliance or above in order to be acceptable to the respective states.

"5. The regulatory agencies of each state shall sign reciprocity agreements containing the above stipulations."

[10] On this record, we are not presented with and need not decide the question of the constitutionality under the Commerce Clause of a State's insistence on reinspection of milk originating in a foreign State where that insistence is not prompted by a health-related need to assure adequate standards but rather is prompted solely as a retaliatory measure because the foreign State refuses to accept the receiving State's standards as adequate.

[11] Mississippi's regulations call for inspection of "each dairy farm, milk hauler, milk plant, receiving station, and transfer station whose milk or milk products are intended for consumption within the State of Mississippi" as a condition to the issuance of a permit, and for periodic inspection thereafter. Miss. Reg. § 5, Record 77. Although appellant's Kentwood plant is, of course, located outside Mississippi and would require out-of-state inspection by Mississippi officials, only six of 105 dairy farms from which A&P purchases raw milk are located outside Mississippi. Plaintiff's Exhibit 1, and Exhibit A.

Appellant represents that it has already offered to pay the

thority District v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972).

III

Mississippi argues that apart from the putative health-related interests served by the clause, the reciprocity requirement is in effect a free-trade provision, advancing the identical national interest that is served by the Commerce Clause.

The argument is two-pronged. First, Mississippi argues that the reciprocity requirement serves to help eliminate "hypertechnical" inspection standards that vary between different States.[12] Such hypertechnical standards are said to burden commerce by requiring costly duplicative or out-of-state inspection in instances where, for truly health-related purposes, the standards of the different States are "substantially equivalent." The Court has recognized that mutually beneficial objectives may be promoted by voluntary reciprocity agreements, and that the existence of such an agreement between two or more States is not a *per se* violation of the Commerce Clause of which citizens of nonreciprocating States who do not receive the benefits conferred by the agreement may complain. See *Kane* v. *New Jersey*, 242 U. S. 160, 167–168 (1916); cf. *Bode* v. *Barrett*, 344 U. S. 583

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reasonable expenses of required out-of-state inspection, Brief for Appellant 7, although evidence of that offer does not appear in the record.

[12] "[W]e say this regulation is wiser and more productive for interstate commerce through all the States than having these picayune problems of how many square feet of floor space is in the milk parlor, or what the temperature of the milk is when it goes to the cooling truck." Tr. of Oral Arg. 20.

A&P agrees that reciprocity among States is a "laudable goal. Reciprocity, by eliminating hyper-technical standards peculiar to one state, may aid the free flow of milk." Jurisdictional Statement 9.

(1953).[13] But we have not held that acceptance of offered reciprocity is required from other States, see *Kane* v. *New Jersey, supra,* at 168, or that a State may threaten complete isolation as the alternative to acceptance of its offer of reciprocity. Mississippi may offer reciprocity to States with substantially equivalent health standards, and insist on enforcement of its own, somewhat different, standards as the alternative. But Mississippi may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement.

The second prong of appellee's argument that the reciprocity requirement promotes trade between the States draws upon Mississippi's allegations that Louisiana is itself violating the Commerce Clause by refusing to admit milk produced in Mississippi. Mississippi asserts that Louisiana has refused reciprocity with Mississippi in bad faith, and in fact has erected economic barriers to the sale of Mississippi milk in Louisiana under the guise of health and inspection regulations. Hence, the reciprocity agreement, it is argued, is a legitimate means by which Mississippi may seek to gain access to Louisiana markets for its own producers as a condition to allowing Louisiana milk to be sold in Mississippi. We cannot agree.

First, to the extent, if any, that Louisiana is unconstitutionally burdening the flow of milk in interstate commerce by erecting and enforcing economic trade barriers

[13] We are not called upon to decide in this case whether or at what point the diversionary effects upon trade occasioned by a given reciprocity agreement (even though voluntary and nondiscriminatory) between some but not all States might be such as to constitute an impermissible burdening of the national interests embodied in the Commerce Clause, or the Compact Clause. Cf. *Bode* v. *Barrett,* 344 U. S., at 586; *Wharton* v. *Wise,* 153 U. S. 155, 171 (1894).

to protect its own producers from competition under the guise of health regulations, the Commerce Clause itself creates the necessary reciprocity: Mississippi and its producers may pursue their constitutional remedy by suit in state or federal court challenging Louisiana's actions as violative of the Commerce Clause.

Second, to the extent that Louisiana is legitimately exercising its local powers in the interest of the health of its citizens by refusing reciprocity and consequently the admission of milk deemed in good faith by state officials to be of insufficient quality, Mississippi is not privileged under the Commerce Clause to force its own judgments as to an adequate level of milk sanitation on Louisiana at the pain of an absolute ban on the interstate flow of commerce in milk. However available such methods in an international system of trade between wholly sovereign nation states, they may not constitutionally be employed by the States that constitute the common market created by the Framers of the Constitution. To allow Mississippi to insist that a sister State either sign a reciprocal agreement acceptable to Mississippi or else be absolutely foreclosed from exporting its products to Mississippi would plainly "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk*, 340 U. S., at 356. No "parochial legislative polic[y]," *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S., at 538, could be more precisely calculated to open "the door . . . to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S., at 522.

> "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and

> that in the long run prosperity and salvation are in union and not division." *Id.*, at 523.

The mandatory reciprocity provision of § 11, insofar as justified by the State as an economic measure, is "precisely the kind of hindrance to the introduction of milk from other States . . . condemned as an 'unreasonable clog upon the mobility of commerce. . . . [It is] hostile in conception as well as burdensome in result.'" *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S., at 377.

Accordingly, we hold that the mandatory character of the reciprocity requirement of § 11 unduly burdens the free flow of interstate commerce and cannot be justified as a permissible exercise of any state power. The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

FISHER *v.* DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF MONTANA, IN AND FOR THE COUNTY OF ROSEBUD

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 75-5366. Decided March 1, 1976

Tribal Court of the Northern Cheyenne Tribe *held* to have exclusive jurisdiction over an adoption proceeding arising on the Northern Cheyenne Indian Reservation in which all parties are members of the Tribe residing on the reservation.

(a) Montana state-court jurisdiction over such a proceeding would interfere with the powers of self-government conferred upon the Tribe by federal law and exercised through the Tribal Court; would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves; and, as the record in this case indicates, would risk conflicting adjudications affecting the custody of the child sought to be adopted and would correspondingly diminish the tribal court's authority.

(b) No federal statute sanctions such interference with tribal self-government. Title 25 U. S. C. § 372a, which is concerned solely with the documentation necessary to prove adoption by an Indian in proceedings before the Secretary of the Interior, and which recognizes adoption "by a judgment or decree of a State court" as one means of documentation, nowhere addresses the jurisdiction of state courts to render such judgments or decrees.

(c) Even assuming that the Montana courts properly exercised jurisdiction over Indian adoptions prior to the organization of the Tribe, that jurisdiction has now been pre-empted by creation of a Tribal Court with jurisdiction over adoptions pursuant to the Indian Reorganization Act of 1934.

(d) Denying tribal-member plaintiffs access to Montana courts in adoption proceedings does not constitute impermissible racial discrimination, since (1) the Tribal Court's exclusive jurisdiction derives, not from the plaintiffs' race, but from the Tribe's quasi-sovereign status under federal law, and (2) even if a jurisdictional holding occasionally denies an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian

is justified as a benefit to the class of which he is a member by furthering the congressional policy of Indian self-government.

Certiorari granted; — Mont. —, 536 P. 2d 190, reversed.

PER CURIAM.

Disagreeing with an advisory opinion of the Appellate Court of the Northern Cheyenne Tribe, the Montana Supreme Court held that the state court has jurisdiction over an adoption proceeding in which all parties are members of the Tribe and residents of the Northern Cheyenne Indian Reservation. We reverse.

Petitioner is the mother of Ivan Firecrow. On July 1, 1969, after petitioner and Ivan's father were divorced, the Tribal Court of the Northern Cheyenne Tribe found that petitioner had neglected Ivan, awarded temporary custody to Josephine Runsabove, and made Ivan a ward of the court.[1] In 1973 the Tribal Court rejected petitioner's request to regain custody of her son.[2] On August 30, 1974, however, the Tribal Court entered an order granting petitioner temporary custody of Ivan "for a period of six weeks during the summer months." [3]

Four days before the entry of that order, Josephine Runsabove and her husband initiated an adoption proceeding in the District Court for the Sixteenth Judicial District of Montana.[4] Petitioner moved to dismiss for lack of subject-matter jurisdiction, asserting that the

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[1] See *State ex rel. Firecrow* v. *District Court*, — Mont. —, —, 536 P. 2d 190, 192 (1975).

[2] *In re Firecrow* (Northern Cheyenne Tribal Ct., filed Aug. 1, 1973). Defendant's Exhibit C.

[3] *In re Firecrow* (Northern Cheyenne Tribal Ct., filed Aug. 30, 1974). Defendant's Exhibit A.

[4] They alleged that petitioner had voluntarily abandoned the child to Josephine Runsabove on June 2, 1969, and had not supported the child for over a year. The natural father consented to the adoption and waived further notice.

Tribal Court possessed exclusive jurisdiction. After a hearing, the District Court certified to the Appellate Court of the Northern Cheyenne Tribe the question whether an ordinance of the Northern Cheyenne Tribe [5] conferred jurisdiction upon the District Court. The Appellate Court of the Tribe expressed the opinion that it did not,[6] and the State District Court dismissed for lack of jurisdiction.

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[5] Chapter 3, § 2, of the Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation, approved by the Commissioner of Indian Affairs, June 9, 1966. The ordinance provides:

"The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.

"Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only adoptions so approved by the Tribal Court shall be recognized.

"On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts."

[6] The opinion of the Appellate Court of the Northern Cheyenne Tribe reads, in relevant part:

"It is the opinion of this Court, and this Court so rules, that the Tribal Court has exclusive jurisdiction of all adoptions of members of the Northern Cheyenne Tribe of Indians where it appears that the minor who is being adopted and all other parties to the adoption proceedings, which is to say, the parent and/or parents of the minor and the person and/or persons adopting said minor are each and all members of the Northern Cheyenne Tribe and each and all reside within the exterior boundaries of the Northern Cheyenne Indian Reservation.

"This Court has not been called upon to decide any issue involving non-members of the Northern Cheyenne Tribe or non-Indians or both, who wish to adopt a member of the Northern Cheyenne

The Runsaboves then filed an original application in the Montana Supreme Court for a writ of supervisory control or other appropriate writ to set aside the order of dismissal. The Montana Supreme Court granted the requested relief, holding that the District Court possessed jurisdiction. The court reasoned that prior to the organization of the Northern Cheyenne Tribe in 1935, the Montana courts possessed jurisdiction over adoptions involving tribal members residing on the reservation and that this jurisdiction could not be unilaterally divested by tribal ordinance; that Congress recognized that jurisdiction of state courts over Indian adoptions in 25 U. S. C. § 372a; and that depriving the Montana courts of jurisdiction would deny equal protection to Indian plaintiffs, at least under the Montana Constitution. *State ex rel. Firecrow* v. *District Court,* — Mont. —, 536 P. 2d 190 (1975).[7]

Tribe. Therefore, this Court does not make any opinion or interpretation as to the provisions of the last (3rd) paragraph of said Section 1 of Chapter III of the Tribal Code." *In re Firecrow,* at 5 (filed Apr. 12, 1975).

[7] The writ of supervisory control issued by the Montana Supreme Court is a final judgment within our jurisdiction under 28 U. S. C. § 1257 (3). It is available only in original proceedings in the Montana Supreme Court, Mont. Const., Art. VII, §§ 2 (1), (2); Mont. Rule App. Civ. Proc. 17 (a), and although it may issue in a broad range of circumstances, it is not equivalent to an appeal. See *ibid.; State ex rel. Amsterdam Lumber, Inc.* v. *District Court,* 163 Mont. 182, 186–187, 516 P. 2d 378, 380–381 (1973); *Walker* v. *Tschache,* 162 Mont. 213, 215–217, 510 P. 2d 9, 10–11 (1973). A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court. *Madruga* v. *Superior Court,* 346 U. S. 556, 557 n. 1 (1954); *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 565–568 (1947); *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 14–15 (1931); see *Costarelli* v. *Massachusetts,* 421 U. S. 193, 197–199 (1975) (*per curiam*).

In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U. S. 217, 220 (1959); accord, *Kennerly* v. *District Court of Montana*, 400 U. S. 423, 426–427 (1971) (*per curiam*). Since this litigation involves only Indians, at least the same standard must be met before the state courts may exercise jurisdiction. *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 168–173, 179–180 (1973).

The right of the Northern Cheyenne Tribe to govern itself independently of state law has been consistently protected by federal statute. As early as 1877, Congress ratified an agreement between the Tribe and the United States providing that "Congress shall, by appropriate legislation, secure to [the Indians] an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life." 19 Stat. 256. This provision remained unaffected by the Act enabling Montana to enter the Union,[8] and by the other statutes specifically concerned with the Northern Cheyenne Tribe.[9]

[8] Act of Feb. 22, 1889, 25 Stat. 676. Section 4 (2) of the Act provides that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . ." For an interpretation of this provision, and similar language in other statehood enabling Acts, see *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 175–176, and n. 15 (1973); *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 69–71 (1962).

[9] The Northern Cheyenne Tribe first came under federal trusteeship by the Treaty of May 10, 1868, 15 Stat. 655, which was subsequently modified by the agreement quoted in text. The Northern

In 1935, the Tribe adopted a constitution and bylaws [10] pursuant to § 16 of the Indian Reorganization Act, 48 Stat. 987, 25 U. S. C. § 476, a statute specifically intended to encourage Indian tribes to revitalize their self-government. *Mescalero Apache Tribe, supra,* at 151. Acting pursuant to the constitution and bylaws, the Tribal Council of the Northern Cheyenne Tribe established the Tribal Court and granted it jurisdiction over adoptions "among members of the Northern Cheyenne Tribe." [11]

State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than

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Cheyenne Indian Reservation was created by Executive Orders on November 26, 1884, and March 19, 1900, 1 C. Kappler, Indian Affairs 860–861 (1904), and it was confirmed as property of the Tribe held in trust by the United States by the Act of June 3, 1926, c. 459, 44 Stat. pt. 2, 690. None of the cited sources grants jurisdiction to Montana.

[10] Constitution and bylaws of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, approved by the Secretary of the Interior, Nov. 23, 1935. These have since been superseded by the Amended Constitution and By-Laws of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, approved by the Assistant Secretary of the Interior, July 8, 1960.

[11] C. 3, § 2, of the Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation. Quoted at n. 5, *supra.*

The third paragraph of § 2 does not confer jurisdiction over this case upon the Montana courts. By its express terms, it confers concurrent jurisdiction only over "adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe," see n. 5, *supra,* and only upon written consent of the Tribal Court.

the one they have established for themselves.[12] As the present record illustrates, it would create a substantial risk of conflicting adjudications affecting the custody of the child and would cause a corresponding decline in the authority of the Tribal Court.

No federal statute sanctions this interference with tribal self-government. Montana has not been granted, nor has it assumed, civil jurisdiction over the Northern Cheyenne Indian Reservation, either under the Act of Aug. 15, 1953, 67 Stat. 588, or under Title IV of the Civil Rights Act of 1968, 82 Stat. 78, 25 U. S. C. § 1321 *et seq.* And contrary to the Runsaboves' contention, 25 U. S. C. § 372a [13] manifests no congressional intent to

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[12] Neither the constitution and bylaws nor the ordinance of the Northern Cheyenne Tribe manifests an intent to cede jurisdiction to Montana. This factor alone distinguishes the decisions upon which the Montana Supreme Court relied. *Bad Horse* v. *Bad Horse*, 163 Mont. 445, 450–451, 517 P. 2d 893, 896, cert. denied, 419 U. S. 847 (1974); *State ex rel. Iron Bear* v. *District Court*, 162 Mont. 335, 337–338, 342–343, 512 P. 2d 1292, 1294, 1297 (1973). We do not decide, however, whether an enactment of a tribal council prior to the effective date of Pub. L. 280, Act of Aug. 15, 1953, 67 Stat. 588, may be sufficient to confer jurisdiction upon the state courts. See *Kennerly* v. *District Court of Montana*, 400 U. S. 423, 426–429 (1971) (*per curiam*); *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 179–180.

[13] Act of July 8, 1940, c. 555, §§ 1, 2, 54 Stat. 746. The statute provides:

"[Sec. 1] [I]n probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption—

"(1) Unless such adoption shall have been—

"(a) by a judgment or decree of a State court;

"(b) by a judgment or decree of an Indian court;

"(c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or

"(d) by an adoption in accordance with a procedure established

confer jurisdiction upon state courts over adoptions by Indians. The statute is concerned solely with the documentation necessary to prove adoption by an Indian in proceedings before the Secretary of the Interior. It recognizes adoption "by a judgment or decree of a State court" as one means of documentation but nowhere addresses the jurisdiction of state courts to render such judgments or decrees. The statute does not confer jurisdiction upon the Montana courts. See *McClanahan*, 411 U. S., at 174–175; *Williams*, 358 U. S., at 220–221.

Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the Tribal Court is exclusive. The Runsaboves have not sought to defend the state court's jurisdiction by arguing that any substantial part of the conduct supporting the adoption petition took place off the reservation. Cf. *DeCoteau* v. *District County Court*, 420 U. S. 425, 428–430, and n. 3 (1975).[14]

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by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or

"(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this Act or in the distribution of the estate of an Indian who has died prior to that date: *Provided*, That an adoption by Indian custom made prior to the effective date of this Act may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living, if the adoptive parent requests that the adoption be recorded, and if the adopted child is an adult and makes such a request or the superintendent on behalf of a minor child approves of the recordation.

"SEC. 2. This Act shall not apply with respect to the distribution of the estates of Indians of the Five Civilized Tribes or the Osage Tribe in the State of Oklahoma, or with respect to the distribution of estates of Indians who have died prior to the effective date of this Act."

[14] The Runsaboves alleged as grounds for adoption that petitioner

The remaining points may be dealt with briefly. The Runsaboves argue that the ordinances of the Northern Cheyenne Tribe could not deprive the Montana courts of the jurisdiction they exercised over tribal matters prior to organization of the Tribe in 1935. The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by § 16 of the Indian Reorganization Act, 25 U. S. C. § 476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, even if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe, a question we do not decide, that jurisdiction has now been pre-empted.

Finally, we reject the argument that denying the Runsaboves access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-

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had abandoned Ivan and given custody to Josephine Runsabove and that petitioner had not supported the child for over a year. Since all parties resided on the reservation at all relevant times, and since the reservation has not been partially terminated, cf. *DeCoteau* v. *District County Court*, 420 U. S., at 429 n. 3, it appears that none of the acts giving rise to the adoption proceedings occurred off the reservation. The Runsaboves do not contend otherwise. They do, however, point out that the birth of Ivan and the marriage and divorce of his parents occurred off the reservation. These facts do not affect our conclusion that the adoption proceeding is within the Tribal Court's exclusive jurisdiction. In a proceeding such as an adoption, which determines the permanent status of litigants, it is appropriate to predicate jurisdiction on the residence of the litigants rather than the location of particular incidents of marginal relevance, at best.

Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton* v. *Mancari*, 417 U. S. 535, 551–555 (1974).

The motion of the Northern Cheyenne Tribe for leave to file a brief, as *amicus curiae*, is granted. The petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted. The judgment of the Supreme Court of Montana is reversed.

It is so ordered.

UNITED STATES *v.* TESTAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 74–753. Argued November 12, 1975—Decided March 2, 1976

Respondent Government trial attorneys with civil service grade GS–13 classifications requested their employing agency to reclassify their positions to grade GS–14, contending that their duties and responsibilities met the requirements for the higher grade and were identical to those of other trial attorneys classified as GS–14 in another agency, and that under the principle of "equal pay for substantially equal work" prescribed in the Classification Act, they were entitled to the higher classification. But their agency, and the Civil Service Commission (CSC) on appeal, denied reclassification. Respondents then sued the Government in the Court of Claims, seeking reclassification as of the date of the first administrative denial of their request, and each seeking backpay, computed at the difference between his GS–13 salary and his claimed GS–14 salary, from that date. The trial judge denied backpay but held that the CSC's refusal to reclassify respondents to GS–14 was arbitrary and that respondents were entitled to an order remanding the case to the CSC with directions so to reclassify respondents. The court en banc, while disapproving the trial judge's recommendation that the court was empowered to direct reclassification, held that if the CSC were to determine that it had made an erroneous classification the court was authorized to award money damages for backpay lost, that the CSC's refusal to compare respondents' positions with those of the other trial attorneys was arbitrary and capricious, and that the court had power to order the CSC to reconsider its classification decision. Accordingly, the court remanded the case to the CSC to make the comparison and to report the result to the court. *Held:*

1. The Tucker Act, which merely confers jurisdiction upon the Court of Claims whenever a substantive right enforceable against the United States for money damages exists, does not in itself support the action taken by the Court of Claims in this case. Pp. 397–398.

2. Neither the Classification Act nor the Back Pay Act creates a substantive right in respondents to backpay for the period of the claimed wrongful classification. Pp. 398–407.

205 Ct. Cl. 330, 499 F. 2d 690, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which all Members joined except STEVENS, J., who took no part in the consideration or decision of the case.

John P. Rupp argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Lee, Acting Assistant Attorney General Jaffe,* and *Ronald R. Glancz.*

Edwin J. McDermott argued the cause and filed a brief for respondents.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This is a suit for reclassification of federal civil service positions and for backpay. It presents a substantial issue concerning the jurisdiction of the Court of Claims and the relief available in that tribunal.

I

The plaintiff-respondents, Herman R. Testan and Francis L. Zarrilli, are trial attorneys employed in the Office of Counsel, Defense Personnel Support Center, Defense Supply Agency, in Philadelphia. They represent the Government in certain matters that come before the Armed Services Board of Contract Appeals of the Department of Defense. Their positions are subject to the Classification Act, 5 U. S. C. § 5101 *et seq.,* and they are presently classified at civil service grade GS–13.

In December 1969 respondents, through their Chief Attorney, requested their employing agency to reclassify their positions to grade GS–14. The asserted ground was that their duties and responsibilities met the requirements for the higher grade under standards promulgated

**Robert N. Sayler,* filed a brief for Melvin Allison et al. as *amici curiae* urging affirmance.

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by the Civil Service Commission in General Attorney Series GS–905–0. In addition, they contended that their duties were identical to those of other trial attorneys in positions classified as GS–14 in the Contract Appeals Division, Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Dayton, Ohio, and that under the principle of "equal pay for substantially equal work," prescribed in § 5101 (1)(A),[1] they were entitled to the higher classification.

The agency, after an audit by a position classification specialist, concluded that the respondents' assigned duties were properly classified at the GS–13 level under the Commission's classification standards. On appeal, the Commission reached the same conclusion and denied reclassification. The Commission also ruled that comparison of the positions held by the respondents with those of attorneys employed by the referenced Logistics Command was not a proper method of classification.

The two respondents then instituted this suit in the Court of Claims.[2] Each sought an order directing reclassification of his position as of the date (May 8, 1970) of the first administrative denial of his request, and backpay, computed at the difference between his salary and grade GS–14 (and the claimed appropriate within-grade step), from that date. The trial judge, in a long opinion, App. 43–117, concluded that the respondents were not

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[1] Title 5, § 5101. "Purpose.

"It is the purpose of this chapter to provide a plan for classification of positions whereby—

"(1) in determining the rate of basic pay which an employee will receive—

"(A) the principle of equal pay for substantially equal work will be followed . . . ."

[2] There is no suggestion that the plaintiff-respondents have not properly pursued and exhausted their administrative remedies.

entitled to backpay due to their allegedly wrongful classification. *Id.*, at 57. But he also concluded that the Commission's refusal to reclassify respondents to GS–14 was arbitrary, discriminatory, and not supported by substantial evidence, *ibid.*, and that as a matter of law the respondents were entitled to an order remanding the case to the Commission with directions so to reclassify the respondents. *Id.*, at 58, 117.

The Court of Claims considered the case en banc and divided 4–3. The majority disapproved the trial judge's recommendation that the court was empowered to direct the reclassification of respondents to GS–14, for the Court of Claims is not authorized to create an entitlement to a governmental position. "If entitlement depends on the exercise of discretion by someone else we cannot substitute our own discretion." 205 Ct. Cl. 330, 332, 499 F. 2d 690, 691 (1974). The majority felt, however, that if the Commission were to determine that it had made an erroneous classification, that determination "could create a legal right which we could then enforce by a money judgment." *Id.*, at 333, 499 F. 2d, at 691.

The majority agreed with the trial judge that the Commission's failure to compare respondents' positions with those of the Logistics Command attorneys was arbitrary and capricious. *Id.*, at 331, 499 F. 2d, at 691. The court observed: "Ordinarily . . . it is not arbitrary and capricious to refuse to consider the grade of employees other than the ones complaining." But it went on to say: "This case is peculiar in its facts," for the employees "all belong to a small readily manageable cadre, their jobs have a large nexus of duties shared in common, and the other employees are specifically pointed out by the complaining employees." *Id.*, at 332, 499 F. 2d, at 691. The court ruled that it had the power under the remand statute, 86 Stat. 652, now codified as part of 28 U. S. C.

§ 1491 (1970 ed., Supp. IV), to order the Commission to reconsider its classification decision "under proper directions." Accordingly, and pursuant to its Rule 149 (b), the court remanded the case to the Commission to make the comparison and to report the result to the court.[3]

The dissent argued that the jurisdiction of the Court of Claims is limited to money judgments and, since none had been or could be ordered in this case, the court was without jurisdiction even to remand the case to the Civil Service Commission. In addition, the respondents had not stated a claim upon which relief could be granted, for they were asking for positions, and pay, to which they had never been appointed. The dissent further argued that there is no constitutional right to a governmental position to which one has not been appointed; that the salary of a Government job is payable only to the person appointed to that position; and that the court has no authority to take over the appointing power that the Constitution, Art. II, § 2, has placed in the Executive Department. It asserted that the decision of the majority was but a declaratory judgment, a legal function not within the court's jurisdiction. Finally, the dissent argued that the classification decision of the Commission was neither arbitrary nor capricious and was supported by substantial evidence. 205 Ct. Cl., at 334–338, 499 F. 2d, at 692–694.

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[3] The decision of the Court of Claims in this case is not inconsistent, as to these issues, with other recent cases resolved by divided votes in that court. See *Chambers* v. *United States*, 196 Ct. Cl. 186, 451 F. 2d 1045 (1971); *Allison* v. *United States*, 196 Ct. Cl. 263, 451 F. 2d 1035 (1971); *Small* v. *United States*, 200 Ct. Cl. 11, 470 F. 2d 1020 (1972); *Pettit* v. *United States*, 203 Ct. Cl. 207, 488 F. 2d 1026 (1973). But see *Applegate* v. *United States*, 207 Ct. Cl. 999, 521 F. 2d 1406 (1975); *Roseman* v. *United States*, 207 Ct. Cl. 998, 521 F. 2d 1406 (1975); *Kaeserman* v. *United States*, 207 Ct. Cl. 983 (1975); *Barnum* v. *United States*, 207 Ct. Cl. 1024, 529 F. 2d 531 (1975).

We granted certiorari because of the importance of the issue in the measure of the Court of Claims' statutory jurisdiction, and because of the significance of the court's decision upon the Commission's administration of the civil service classification system. 420 U. S. 923 (1975).

II

We turn to the respective statutes that are advanced as support for the action taken by the Court of Claims.

A. The Tucker Act. The central provision establishing the jurisdiction of the court is that part of the Tucker Act now codified as 28 U. S. C. § 1491:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." [4]

This Court recently had occasion to examine the jurisdiction of the Court of Claims under this statutory formulation. In *United States* v. *King*, 395 U. S. 1 (1969), the Court reviewed a decision (182 Ct. Cl. 631, 390 F. 2d 894) in which the Court of Claims had concluded that it was empowered to exercise jurisdiction under the Declaratory Judgment Act, 28 U. S. C. § 2201. This Court observed that the Court of Claims was established by Congress in 1855; that "[t]hroughout its entire history," until the *King* case was filed, "its jurisdiction has been limited to money claims against the

[4] Title 28 U. S. C. § 1494 also grants the Court of Claims jurisdiction to determine the amount due from the United States "by reason of any unsettled account of any officer . . . of . . . the United States."

United States Government"; that decided cases in this Court had "reaffirmed this view of the limited jurisdiction of the Court of Claims," and "the passage of the Tucker Act in 1887 had not expanded that jurisdiction to equitable matters"; that "neither the Act creating the Court of Claims nor any amendment to it" granted that court jurisdiction of the case before it because King's claim was "not limited to actual, presently due money damages from the United States"; and that what King was requesting was "essentially equitable relief of a kind that the Court of Claims has held throughout its history . . . it does not have the power to grant." 395 U. S., at 2–3. The Court then went on to hold that the Declaratory Judgment Act did not grant the Court of Claims authority to issue declaratory judgments. Cited in support of all this were *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 557 (1962) (Harlan, J.) (plurality opinion); *United States* v. *Jones*, 131 U. S. 1 (1889); and *United States* v. *Alire*, 6 Wall. 573, 575 (1868). See *Lee* v. *Thornton*, 420 U. S. 139 (1975); *Richardson* v. *Morris*, 409 U. S. 464 (1973); *United States* v. *Sherwood*, 312 U. S. 584, 589–591 (1941).

The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists. *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl. 599, 605–607, 372 F. 2d 1002, 1007–1009 (1967). We therefore must determine whether the two other federal statutes that are invoked by the respondents confer a substantive right to recover money damages from the United States for the period of their allegedly wrongful civil service classifications.

B. The Classification Act. Inasmuch as the trial judge

proposed, App. 57, that the respondents were not entitled to backpay under the Back Pay Act, 5 U. S. C. § 5596, and the Court of Claims held that there was no need for it to reach and construe that Act, 205 Ct. Cl., at 333, 499 F. 2d, at 691, it is implicit in the court's decision in favor of respondents that a violation of the Classification Act gives rise to a claim for money damages for pay lost by reason of the allegedly wrongful classifications.

It long has been established, of course, that the United States, as sovereign, "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood,* 312 U. S., at 586. And it has been said, in a Court of Claims context, that a waiver of the traditional sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King,* 395 U. S., at 4; *Soriano* v. *United States,* 352 U. S. 270, 276 (1957). Thus, except as Congress has consented to a cause of action against the United States, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States." *United States* v. *Sherwood,* 312 U. S., at 587–588.

We find no provision in the Classification Act that expressly makes the United States liable for pay lost through allegedly improper classifications. To be sure, in the "purpose" section of the Act, 5 U. S. C. § 5101 (1) (A), Congress stated that it was "to provide a plan for classification of positions whereby . . . the principle of equal pay for substantially equal work will be followed." And in subsequent sections, there are set forth substantive standards for grading particular positions, and provisions for procedures to ensure that those standards are met. But none of these several sections contains an express

provision for an award of backpay to a person who has been erroneously classified.

In answer to this fact, the respondents and the *amici* make two observations. They first argue that the Tucker Act fundamentally waives sovereign immunity with respect to any claim invoking a constitutional provision or a federal statute or regulation, and makes available any and all generally accepted and important forms of redress, including money damages. It is said that the Government has confused two very different issues, namely, whether there has been a waiver of sovereignty, and whether a substantive right has been created, and it is claimed that where there has been a violation of a substantive right, the Tucker Act waives sovereign immunity as to all measures necessary to redress that violation.

The argument does not persuade us. As stated above, the Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity. The respondents do not rest their claims upon a contract; neither do they seek the return of money paid by them to the Government. It follows that the asserted entitlement to money damages depends upon whether any federal statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport S. S. Corp.* v. *United States,* 178 Ct. Cl., at 607, 372 F. 2d, at 1009; *Mosca* v. *United States,* 189 Ct. Cl. 283, 290, 417 F. 2d 1382, 1386 (1969), cert. denied, 399 U. S. 911 (1970). We are not ready to tamper with these established principles because it might be thought that they should be responsive to a particular conception of enlightened governmental policy. See Brief for *Amici Curiae* 9–11. In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity, and

we regard as unsound the argument of *amici* that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation.

We perceive nothing in the *Regional Rail Reorganization Act Cases*, 419 U. S. 102 (1974), cited by the *amici* with other cases centering in the Just Compensation Clause of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation"), that lends support to the respondents. These Fifth Amendment cases are tied to the language, purpose, and self-executing aspects of that constitutional provision, *Jacobs* v. *United States*, 290 U. S. 13, 16 (1933), and are not authority to the effect that the Tucker Act eliminates from consideration the sovereign immunity of the United States.

The respondents and the *amici* next argue that the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages because, if this were not so, the employee would then have a right without a remedy, inasmuch as he is denied access to the one forum where he may seek redress.[5]

Here again we are not persuaded. Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim—whether it be the Constitution, a statute,

[5] The *amici* acknowledge that it is conceivable that the respondents will be able to obtain reclassification for the future through the mandamus action they instituted in 1971. See *Testan* v. *Hampton*, Civ. No. 71–2250 (ED Pa.). That suit apparently lies dormant subject to reactivation. The Government states that if respondents proceed with the action, the United States "will not contest the district court's jurisdiction to entertain respondents' claim for prospective equitable relief." Reply Brief for United States 17 n. 7.

or a regulation—does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport S. S. Corp.* v. *United States,* 178 Ct. Cl., at 607, 372 F. 2d, at 1008, 1009. We see nothing akin to this in the Classification Act or in the context of a suit seeking reclassification.

The present action, of course, is not one concerning a wrongful discharge or a wrongful suspension. In that situation, at least since the Civil Service Act of 1883, the employee is entitled to the emoluments of his position until he has been legally disqualified. *United States* v. *Wickersham,* 201 U. S. 390 (1906). There is no claim here that either respondent has been denied the benefit of the position to which he was appointed. The claim, instead, is that each has been denied the benefit of a position to which he should have been, but was not, appointed. The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. *United States* v. *McLean,* 95 U. S. 750 (1878); *Ganse* v. *United States,* 180 Ct. Cl. 183, 186, 376 F. 2d 900, 902 (1967). The Classification Act does not purport by its terms to change that rule, and we see no suggestion in it or in its legislative history that Congress intended to alter it.

The case of *Selman* v. *United States,* 204 Ct. Cl. 675, 498 F. 2d 1354 (1974), pressed upon us by the respondents,[6] if correct, is clearly distinguishable. The pay claims there rested flatly upon the mandatory provision contained in 37 U. S. C. § 202 (*l*) to the effect that an officer "serving as Assistant Judge Advocate General of the Navy is entitled to the basic pay of a rear admiral (lower half) or brigadier general, as appropriate."

[6] Brief for Respondents 12; Tr. of Oral Arg. 25–28.

Neither the Classification Act nor the Back Pay Act contains any mandatory provision of this kind.

The situation, as we see it, is not that Congress has left the respondents remediless, as they assert, for their allegedly wrongful civil service classification, but that Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification. There is a difference between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other. See *Edelman* v. *Jordan*, 415 U. S. 651 (1974). Respondents, of course, have an administrative avenue of prospective relief available to them under the elaborate and structured provisions of the Classification Act, 5 U. S. C. §§ 5101–5115. The *amici* so recognize. Brief for *Amici Curiae* 13–15. Among the Act's provisions along this line are those requiring the Civil Service Commission to engage in supervisory review of an agency's classifications, and, where necessary, to review and reclassify individual positions, 5 U. S. C. § 5110; allowing the Commission to reclassify, § 5112; and allowing the Commission even to revoke or suspend the agency's authority to classify its own positions, § 5111. Indeed, as the *amici* describe it: "[T]he Act is not merely a hortatory catalogue of high principles." Brief for *Amici Curiae* 15. The built-in avenue of administrative relief is one response to these statutory requirements. Review and reclassification may be brought into play at the request of an employee. 5 U. S. C. § 5112 (b). And respondents, as has been noted, did just that. A second possible avenue of relief—and it, too, seemingly, is only prospective—is by way of mandamus, under 28 U. S. C. § 1361, in a proper federal district court. In this way, also, the respondents have asserted their claims. See n. 5, *supra*.

The respondents, thus, are not entirely without remedy. They are without the remedies in the Court of Claims

of retroactive classification and money damages to which they assert they are entitled. Additional remedies of this kind are for the Congress to provide and not for the courts to construct.

Finally, we note that if the respondents were correct in their claims to retroactive classification and money damages, many of the federal statutes—such as the Back Pay Act—that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous.

The Court of Claims, in the present case, sought to avoid all this by its remand to the Civil Service Commission for further proceedings. If, then, the Commission were to find that the respondents were entitled to a higher grade, the Court of Claims announced that it would be prepared on appropriate motion to enter an award of money damages for the respondents for whatever backpay they lost during the period of their wrongful classifications. See *Chambers* v. *United States*, 196 Ct. Cl. 186, 451 F. 2d 1045 (1971). The remand statute, Pub. L. 92–415, 86 Stat. 652, now codified as part of 28 U. S. C. § 1491 (1970 ed., Supp. IV), authorizes the Court of Claims to "issue orders directing restoration to . . . position, placement in appropriate duty . . . status, and correction of applicable records" in order to complement the relief afforded by a money judgment, and also to "remand appropriate matters to any administrative . . . body" in a case "within its jurisdiction." The remand statute, thus, applies only to cases already within the court's jurisdiction. The present litigation is not such a case.[7]

[7] The committee reports relating to Pub. L. 92–415 expressly confirm the understanding that the remand statute "does not extend the class of cases over which the Court of Claims has jurisdiction." S. Rep. No. 92–1066, p. 1 (1972); H. R. Rep. No. 92–1023, p. 3 (1972).

Respondents cite *Allison* v. *United States,* 196 Ct. Cl. 263, 451 F. 2d 1035 (1971), and *Pettit* v. *United States,* 203 Ct. Cl. 207, 488 F. 2d 1026 (1973), as precedent for the remand order in this case. Those cases found the employees' "entitlement" to money damages in an Executive Order, and to that extent might be distinguishable from the instant case. But cf. *Ogletree* v. *McNamara,* 449 F. 2d 93 (CA6 1971); *Gnotta* v. *United States,* 415 F. 2d 1271 (CA8 1969), cert. denied, 397 U. S. 934 (1970); *Manhattan-Bronx Postal Union* v. *Gronouski,* 121 U. S. App. D. C. 321, 350 F. 2d 451 (1965), cert. denied, 382 U. S. 978 (1966). To the extent, however, that *Allison* and *Pettit* rely on the concept that an admission of misclassification by an agency automatically gives rise to a cause of action for money damages against the United States, their reasoning is identical to the Court of Claims' reasoning in the instant case; and to the extent that analysis is now rejected, the analysis of *Allison* and *Pettit* is necessarily rejected. See also *Chambers* v. *United States, supra.*

C. The Back Pay Act. This statute, which the Court of Claims found unnecessary to evaluate in arriving at its decision, does not apply, in our view, to wrongful-classification claims. The Act does authorize retroactive recovery of wages whenever a federal employee has "undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of" the compensation to which the employee is otherwise entitled. 5 U. S. C. § 5596 (b). The statute's language was intended to provide a monetary remedy for wrongful reductions in grade, removals, suspensions, and "other unwarranted or unjustified actions affecting pay or allowances [that] could occur in the course of reassignments and change from full-time to part-time work." S. Rep. No. 1062, 89th Cong., 2d

Sess., 3 (1966). The Commission consistently has so construed the Back Pay Act. See 5 CFR § 550.803 (e) (1975). So has the Court of Claims. See *Desmond* v. *United States*, 201 Ct. Cl. 507, 527 (1973).

For many years federal personnel actions were viewed as entirely discretionary and therefore not subject to any judicial review, and in the absence of a statute eliminating that discretion, courts refused to intervene where an employee claimed that he had been wrongfully discharged. Compare *Keim* v. *United States*, 177 U. S. 290, 293–296 (1900), with *United States* v. *Wickersham*, 201 U. S. 390 (1906). See *Sampson* v. *Murray*, 415 U. S. 61, 69–70 (1974). Relief was invariably denied where the claim was that the employee had been denied a promotion on improper grounds. See *Keim* v. *United States*, 177 U. S., at 296; *United States* v. *McLean*, 95 U. S., at 753.

Congress, of course, now has provided specifically in the Lloyd-LaFollette Act, 5 U. S. C. § 7501, for administrative review of a claim of wrongful adverse action, and in the Back Pay Act for the award of money damages for a wrongful deprivation of pay. But federal agencies continue to have discretion in determining most matters relating to the terms and conditions of federal employment. One continuing aspect of this is the rule, mentioned above, that the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade. Congress did not override this rule, or depart from it, with its enactment of the Back Pay Act. It could easily have so provided had that been its intention.[8]

[8] In 1972, Congress made Title VII of the Civil Rights Act of 1964 applicable to federal employees. 86 Stat. 103, 42 U. S. C. § 2000e (a)

In support of their contention that the Back Pay Act authorizes a claim in the situation here presented, respondents and *amici* cite only two cases other than the Court of Claims cases whose reasoning is directly in question here. Neither case supports the proposition. *Walker* v. *Kleindienst*, 357 F. Supp. 749 (DC 1973). (cited by respondents), addressed the issue of the retroactivity of the Equal Employment Opportunity Act of 1972. *Ainsworth* v. *United States*, 185 Ct. Cl. 110, 399 F. 2d 176 (1968) (cited by *amici*), involved the rights of an employee who had been discharged and subsequently reinstated.

Neither of these cases provides a reason for doubting that the Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position.

III

We therefore conclude that neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to backpay for the period of their claimed wrongful classifications. This makes it unnecessary for us to consider the additional argument advanced by the United States that the Classification Act does not require that positions held by employees of one agency be compared with those of employees in another agency.

The Court of Claims was in error when it remanded the case to the Civil Service Commission for further proceedings. That court's judgment is therefore reversed,

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(1970 ed., Supp. IV). The nature of that explicit waiver of sovereign immunity is presently before the Court. See *Brown* v. *General Services Administration*, 507 F. 2d 1300 (CA2 1974), cert. granted, 421 U. S. 987 (1975).

and the case is remanded with directions to dismiss the respondents' suit.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

Syllabus

IMBLER *v.* PACHTMAN, DISTRICT ATTORNEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–5435. Argued November 3, 1975—Decided March 2, 1976

Petitioner, convicted of murder, unsuccessfully petitioned for state habeas corpus on the basis of respondent prosecuting attorney's revelation of newly discovered evidence, and charged that respondent had knowingly used false testimony and suppressed material evidence at petitioner's trial. Petitioner thereafter filed a federal habeas corpus petition based on the same allegations, and ultimately obtained his release. He then brought an action against respondent and others under 42 U. S. C. § 1983, seeking damages for loss of liberty allegedly caused by unlawful prosecution, but the District Court held that respondent was immune from liability under § 1983, and the Court of Appeals affirmed. *Held:* A state prosecuting attorney who, as here, acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the State's case, is absolutely immune from a civil suit for damages under § 1983 for alleged deprivations of the accused's constitutional rights. Pp. 417–431.

(a) Section 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them. *Tenney* v. *Brandhove*, 341 U. S. 367. Pp. 417–419.

(b) The same considerations of public policy that underlie the common-law rule of absolute immunity of a prosecutor from a suit for malicious prosecution likewise dictate absolute immunity under § 1983. Although such immunity leaves the genuinely wronged criminal defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty, the alternative of qualifying a prosecutor's immunity would disserve the broader public interest in that it would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system and would often prejudice criminal defendants by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. Pp. 420–428.

500 F. 2d 1301, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 432. STEVENS, J., took no part in the consideration or decision of the case.

Roger S. Hanson argued the cause and filed a brief for petitioner.

John P. Farrell argued the cause for respondent. With him on the brief was *John H. Larson*.

Solicitor General Bork argued the cause for the United States as *amicus curiae*. With him on the brief were *Acting Assistant Attorney General Keeney, Deputy Solicitor General Friedman, Harry R. Sachse*, and *Jerome M. Feit*.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The question presented in this case is whether a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to suit under 42 U. S. C. § 1983 for alleged deprivations of the defendant's constitutional rights. The Court of Appeals for the Ninth Circuit held that he is not. 500 F. 2d 1301. We affirm.

I

The events which culminated in this suit span many years and several judicial proceedings. They began in

**Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *S. Clark Moore*, Assistant Attorney General, and *Russell Iungerich* and *Edward T. Fogel, Jr.*, Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging affirmance.

Joseph P. Busch and *Patrick F. Healy* filed a brief for the National District Attorneys Association as *amicus curiae*.

January 1961, when two men attempted to rob a Los Angeles market run by Morris Hasson. One shot and fatally wounded Hasson, and the two fled in different directions. Ten days later Leonard Lingo was killed while attempting a robbery in Pomona, Cal., but his two accomplices escaped. Paul Imbler, petitioner in this case, turned himself in the next day as one of those accomplices. Subsequent investigation led the Los Angeles District Attorney to believe that Imbler and Lingo had perpetrated the first crime as well, and that Imbler had killed Hasson. Imbler was charged with first-degree felony murder for Hasson's death.

The State's case consisted of eyewitness testimony from Hasson's wife and identification testimony from three men who had seen Hasson's assailants fleeing after the shooting. Mrs. Hasson was unable to identify the gunman because a hat had obscured his face, but from police photographs she identified the killer's companion as Leonard Lingo. The primary identification witness was Alfred Costello, a passerby on the night of the crime, who testified that he had a clear view both as the gunman emerged from the market and again a few moments later when the fleeing gunman—after losing his hat—turned to fire a shot at Costello [1] and to shed his coat [2] before continuing on. Costello positively identified Imbler as the gunman. The second identification witness, an attendant at a parking lot through which the gunman ultimately escaped, testified that he had a side and front view as the man passed. Finally, a customer who was leaving Hasson's market as the robbers entered

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[1] This shot formed the basis of a second count against Imbler for assault, which was tried with the murder count.

[2] This coat, identified by Mrs. Hasson as that worn by her husband's assailant, yielded a gun determined by ballistics evidence to be the murder weapon.

testified that he had a good look then and as they exited moments later. All of these witnesses identified Imbler as the gunman, and the customer also identified the second man as Leonard Lingo. Rigorous cross-examination failed to shake any of these witnesses.[3]

Imbler's defense was an alibi. He claimed to have spent the night of the Hasson killing bar-hopping with several persons, and to have met Lingo for the first time the morning before the attempted robbery in Pomona. This testimony was corroborated by Mayes, the other accomplice in the Pomona robbery, who also claimed to have accompanied Imbler on the earlier rounds of the bars. The jury found Imbler guilty and fixed punishment at death.[4] On appeal the Supreme Court of California affirmed unanimously over numerous contentions of error. *People* v. *Imbler*, 57 Cal. 2d 711, 371 P. 2d 304 (1962).

Shortly thereafter Deputy District Attorney Richard Pachtman, who had been the prosecutor at Imbler's trial and who is the respondent before this Court, wrote to the Governor of California describing evidence turned up after trial by himself and an investigator for the state correctional authority. In substance, the evidence consisted of newly discovered corroborating witnesses for Imbler's alibi, as well as new revelations about prime witness Costello's background which indicated that he was less trustworthy than he had represented originally to Pachtman and in his testimony. Pachtman noted that leads to some of this information had been available to Imbler's counsel prior to trial but apparently

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[3] A fourth man who saw Hasson's killer leaving the scene identified Imbler in a pretrial lineup, but police were unable to find him at the time of trial.

[4] Imbler also received a 10-year prison term on the assault charge. See n. 1, *supra*.

had not been developed, that Costello had testified convincingly and withstood intense cross-examination, and that none of the new evidence was conclusive of Imbler's innocence. He explained that he wrote from a belief that "a prosecuting attorney has a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented." [5]

Imbler filed a state habeas corpus petition shortly after Pachtman's letter. The Supreme Court of California appointed one of its retired justices as referee to hold a hearing, at which Costello was the main attraction. He recanted his trial identification of Imbler, and it also was established that on cross-examination and redirect he had painted a picture of his own background that was more flattering than true. Imbler's corroborating witnesses, uncovered by prosecutor Pachtman's investigations, also testified.

In his brief to the Supreme Court of California on this habeas petition, Imbler's counsel described Pachtman's post-trial detective work as "[i]n the highest tradition of law enforcement and justice," and as a premier example of "devotion to duty." [6] But he also charged that the prosecution had knowingly used false testimony and suppressed material evidence at Imbler's trial.[7] In a thorough opinion by then Justice Traynor, the Supreme Court of California unanimously rejected these contentions and denied the writ. *In re Imbler,*

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[5] Brief for Respondent, App. A, p. 6. The record does not indicate what specific action was taken in response to Pachtman's letter. We do note that the letter was dated August 17, 1962, and that Imbler's execution, scheduled for September 12, 1962, subsequently was stayed. The letter became a part of the permanent record in the case available to the courts in all subsequent litigation.

[6] Brief for Respondent 5.

[7] See generally *Napue* v. *Illinois,* 360 U. S. 264 (1959); *Brady* v. *Maryland,* 373 U. S. 83 (1963).

60 Cal. 2d 554, 387 P. 2d 6 (1963). The California court noted that the hearing record fully supported the referee's finding that Costello's recantation of his identification lacked credibility compared to the original identification itself, *id.*, at 562, 387 P. 2d, at 10–11, and that the new corroborating witnesses who appeared on Imbler's behalf were unsure of their stories or were otherwise impeached, *id.*, at 569–570, 387 P. 2d, at 14.

In 1964, the year after denial of his state habeas petition, Imbler succeeded in having his death sentence overturned on grounds unrelated to this case. *In re Imbler*, 61 Cal. 2d 556, 393 P. 2d 687 (1964). Rather than resentence him, the State stipulated to life imprisonment. There the matter lay for several years, until in late 1967 or early 1968 Imbler filed a habeas corpus petition in Federal District Court based on the same contentions previously urged upon and rejected by the Supreme Court of California.

The District Court held no hearing. Instead, it decided the petition upon the record, including Pachtman's letter to the Governor and the transcript of the referee's hearing ordered by the Supreme Court of California. Reading that record quite differently than had the seven justices of the State Supreme Court, the District Court found eight instances of state misconduct at Imbler's trial, the cumulative effect of which required issuance of the writ. *Imbler* v. *Craven*, 298 F. Supp. 795, 812 (CD Cal. 1969). Six occurred during Costello's testimony and amounted in the court's view to the culpable use by the prosecution of misleading or false testimony.[8] The other two instances were suppressions of

[8] The District Court found that Costello had given certain ambiguous or misleading testimony, and had lied flatly about his criminal record, his education, and his current income. As to the misleading testimony, the court found that either Pachtman or a

evidence favorable to Imbler by a police fingerprint expert who testified at trial and by the police who investigated Hasson's murder.[9] The District Court ordered that the writ of habeas corpus issue unless California retried Imbler within 60 days, and denied a petition for rehearing.

The State appealed to the Court of Appeals for the Ninth Circuit, claiming that the District Court had failed to give appropriate deference to the factual determinations of the Supreme Court of California as required by 28 U. S. C. § 2254 (d). The Court of Appeals affirmed, finding that the District Court had merely "reached different conclusions than the state court in applying federal constitutional standards to [the] facts," *Imbler* v. *California*, 424 F. 2d 631, 632, and certiorari was denied, 400 U. S. 865 (1970). California chose not to retry Imbler, and he was released.

At this point, after a decade of litigation and with Imbler now free, the stage was set for the present suit. In April 1972, Imbler filed a civil rights action, under 42 U. S. C. § 1983 and related statutes, against respondent Pachtman, the police fingerprint expert, and various other officers of the Los Angeles police force. He alleged

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police officer present in the courtroom knew it was misleading. As to the false testimony, the District Court concluded that Pachtman had "cause to suspect" its falsity although, apparently, no actual knowledge thereof. See 298 F. Supp., at 799–807. The Supreme Court of California earlier had addressed and rejected allegations based on many of the same parts of Costello's testimony. It found either an absence of falsehood or an absence of prosecutorial knowledge in each instance. See *In re Imbler*, 60 Cal. 2d 554, 562–565, and n. 3, 387 P. 2d 6, 10–12, and n. 3 (1963).

[9] See 298 F. Supp., at 809–811. The Supreme Court of California earlier had rejected similar allegations. See *In re Imbler*, *supra*, at 566–568, 387 P. 2d, at 12–13.

that a conspiracy among them unlawfully to charge and convict him had caused him loss of liberty and other grievous injury. He demanded $2.7 million in actual and exemplary damages from each defendant, plus $15,000 attorney's fees.

Imbler attempted to incorporate into his complaint the District Court's decision granting the writ of habeas corpus, and for the most part tracked that court's opinion in setting out the overt acts in furtherance of the alleged conspiracy. The gravamen of his complaint against Pachtman was that he had "with intent, and on other occasions with negligence" allowed Costello to give false testimony as found by the District Court, and that the fingerprint expert's suppression of evidence was "chargeable under federal law" to Pachtman. In addition Imbler claimed that Pachtman had prosecuted him with knowledge of a lie detector test that had "cleared" Imbler, and that Pachtman had used at trial a police artist's sketch of Hasson's killer made shortly after the crime and allegedly altered to resemble Imbler more closely after the investigation had focused upon him.

Pachtman moved under Fed. Rule Civ. Proc. 12 (b)(6) to have the complaint dismissed as to him. The District Court, noting that public prosecutors repeatedly had been held immune from civil liability for "acts done as part of their traditional official functions," found that Pachtman's alleged acts fell into that category and granted his motion. Following the entry of final judgment as to Pachtman under Fed. Rule Civ. Proc. 54 (b), Imbler appealed to the Court of Appeals for the Ninth Circuit. That court, one judge dissenting, affirmed the District Court in an opinion finding Pachtman's alleged acts to have been committed "during prosecutorial activities which can only be characterized as an 'integral part of the judicial process,'" 500 F. 2d, at 1302, quoting

Marlowe v. *Coakley*, 404 F. 2d 70 (CA9 1968). We granted certiorari to consider the important and recurring issue of prosecutorial liability under the Civil Rights Act of 1871. 420 U. S. 945 (1975).

II

Title 42 U. S. C. § 1983 provides that "[e]very person" who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages.[10] The statute thus creates a species of tort liability that on its face admits of no immunities, and some have argued that it should be applied as stringently as it reads.[11] But that view has not prevailed.

This Court first considered the implications of the statute's literal sweep in *Tenney* v. *Brandhove*, 341 U. S. 367 (1951). There it was claimed that members of a state legislative committee had called the plaintiff to appear before them, not for a proper legislative purpose, but to intimidate him into silence on certain matters of public concern, and thereby had deprived him of his constitutional rights. Because legislators in both England and this country had enjoyed absolute immunity for their official actions, *Tenney* squarely presented the issue of whether the Reconstruction Congress had intended to

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[10] Title 42 U. S. C. § 1983, originally passed as § 1 of the Civil Rights Act of 1871, 17 Stat. 13, reads in full:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[11] See, *e. g.*, *Pierson* v. *Ray*, 386 U. S. 547, 559 (1967) (Douglas, J., dissenting); *Tenney* v. *Brandhove*, 341 U. S. 367, 382–383 (1951) (Douglas, J., dissenting).

restrict the availability in § 1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials. The Court concluded that immunities "well grounded in history and reason" had not been abrogated "by covert inclusion in the general language" of § 1983. 341 U. S., at 376. Regardless of any unworthy purpose animating their actions, legislators were held to enjoy under this statute their usual immunity when acting "in a field where legislators traditionally have power to act." *Id.*, at 379.

The decision in *Tenney* established that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them. Before today the Court has had occasion to consider the liability of several types of government officials in addition to legislators. The common-law absolute immunity of judges for "acts committed within their judicial jurisdiction," see *Bradley* v. *Fisher*, 13 Wall. 335 (1872), was found to be preserved under § 1983 in *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967).[12] In the same case, local police officers sued for a deprivation of liberty resulting from unlawful arrest were held to enjoy under § 1983 a "good faith and probable cause" defense coextensive with their defense to false arrest actions at

[12] The Court described the immunity of judges as follows:

"Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley* v. *Fisher*, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" 386 U. S., at 553–554 (citation omitted).

common law. 386 U. S., at 555–557. We found qualified immunities appropriate in two recent cases.[13] In *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974), we concluded that the Governor and other executive officials of a State had a qualified immunity that varied with "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action. . . ." *Id.,* at 247.[14] Last Term in *Wood* v. *Strickland,* 420 U. S. 308 (1975), we held that school officials, in the context of imposing disciplinary penalties, were not liable so long as they could not reasonably have known that their action violated students' clearly established constitutional rights, and provided they did not act with malicious intention to cause constitutional or other injury. *Id.,* at 322; cf. *O'Connor* v. *Donaldson,* 422 U. S. 563, 577 (1975). In *Scheuer* and in *Wood,* as in the two earlier cases, the considerations underlying the nature of the immunity of the respective officials in suits at common law led to essentially the same immunity under § 1983.[15] See 420 U. S., at 318–321; 416 U. S., at 239–247, and n. 4.

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[13] The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial. See *Scheuer* v. *Rhodes,* 416 U. S. 232, 238–239 (1974); *Wood* v. *Strickland,* 420 U. S. 308, 320-322 (1975).

[14] The elements of this immunity were described in *Scheuer* as follows:

"It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U. S., at 247–248.

[15] In *Tenney* v. *Brandhove,* of course, the Court looked to the

III

This case marks our first opportunity to address the § 1983 liability of a state prosecuting officer. The Courts of Appeals, however, have confronted the issue many times and under varying circumstances. Although the precise contours of their holdings have been unclear at times, at bottom they are virtually unanimous that a prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties.[16] These courts sometimes have described the prosecutor's immunity as a form of "quasi-judicial" immunity and referred to it as derivative of the immunity of judges recognized in *Pierson* v. *Ray*, *supra*.[17] Petitioner focuses upon the "quasi-judicial" characterization, and contends that it illustrates a fundamental illogic in according absolute immunity to a prosecutor. He argues that the prosecutor, as a member of the executive branch, cannot claim the immunity reserved for the judiciary, but only a qualified immunity

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immunity accorded legislators by the Federal and State Constitutions, as well as that developed by the common law. 341 U. S., at 372–375. See generally *Doe* v. *McMillan*, 412 U. S. 306 (1973).

[16] *Fanale* v. *Sheehy*, 385 F. 2d 866, 868 (CA2 1967); *Bauers* v. *Heisel*, 361 F. 2d 581 (CA3 1966), cert. denied, 386 U. S. 1021 (1967); *Carmack* v. *Gibson*, 363 F. 2d 862, 864 (CA5 1966); *Tyler* v. *Witkowski*, 511 F. 2d 449, 450–451 (CA7 1975); *Barnes* v. *Dorsey*, 480 F. 2d 1057, 1060 (CA8 1973); *Kostal* v. *Stoner*, 292 F. 2d 492, 493 (CA10 1961), cert. denied, 369 U. S. 868 (1962); cf. *Guerro* v. *Mulhearn*, 498 F. 2d 1249, 1255–1256 (CA1 1974); *Weathers* v. *Ebert*, 505 F. 2d 514, 515–516 (CA4 1974). But compare *Hurlburt* v. *Graham*, 323 F. 2d 723 (CA6 1963), with *Hilliard* v. *Williams*, 465 F. 2d 1212 (CA6), cert. denied, 409 U. S. 1029 (1972). See Part IV, *infra*.

[17] *E. g.*, *Tyler* v. *Witkowski*, *supra*, at 450; *Kostal* v. *Stoner*, *supra*, at 493; *Hampton* v. *City of Chicago*, 484 F. 2d 602, 608 (CA7 1973), cert. denied, 415 U. S. 917 (1974). See n. 20, *infra*.

akin to that accorded other executive officials in this Court's previous cases.

Petitioner takes an overly simplistic approach to the issue of prosecutorial liability. As noted above, our earlier decisions on § 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983. Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it. The liability of a state prosecutor under § 1983 must be determined in the same manner.

A

The function of a prosecutor that most often invites a common-law tort action is his decision to initiate a prosecution, as this may lead to a suit for malicious prosecution if the State's case misfires. The first American case to address the question of a prosecutor's amenability to such an action was *Griffith* v. *Slinkard,* 146 Ind. 117, 44 N. E. 1001 (1896).[18] The complaint charged that a local prosecutor without probable cause added the plaintiff's name to a grand jury true bill after the grand jurors had refused to indict him, with the result that the plaintiff was arrested and forced to appear in court repeatedly before the charge finally was *nolle prossed.* Despite allegations of malice, the Supreme Court of Indiana dismissed the action on the ground that the prosecutor was absolutely immune. *Id.,* at 122, 44 N. E., at 1002.

[18] The Supreme Court of Indiana in *Griffith* cited an earlier Massachusetts decision, apparently as authority for its own holding. But that case, *Parker* v. *Huntington,* 68 Mass. 124 (1854), involved the elements of a malicious prosecution cause of action rather than the immunity of a prosecutor. See also Note, 73 U. Pa. L. Rev. 300, 304 (1925).

The *Griffith* view on prosecutorial immunity became the clear majority rule on the issue.[19] The question eventually came to this Court on writ of certiorari to the Court of Appeals for the Second Circuit. In *Yaselli* v. *Goff*, 12 F. 2d 396 (1926), the claim was that the defendant, a Special Assistant to the Attorney General of the United States, maliciously and without probable cause procured plaintiff's grand jury indictment by the willful introduction of false and misleading evidence. Plaintiff sought some $300,000 in damages for having been subjected to the rigors of a trial in which the court ultimately directed a verdict against the Government. The District Court dismissed the complaint, and the Court of Appeals affirmed. After reviewing the development of the doctrine of prosecutorial immunity, *id.*, at 399–404, that court stated:

> "In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy." *Id.*, at 406.

After briefing and oral argument, this Court affirmed the Court of Appeals in a *per curiam* opinion. *Yaselli* v. *Goff*, 275 U. S. 503 (1927).

The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-

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[19] *Smith* v. *Parman*, 101 Kan. 115, 165 P. 663 (1917); *Semmes* v. *Collins*, 120 Miss. 265, 82 So. 145 (1919); *Kittler* v. *Kelsch*, 56 N. D. 227, 216 N. W. 898 (1927); *Watts* v. *Gerking*, 111 Ore. 654, 228 P. 135 (1924) (on rehearing). Contra, *Leong Yau* v. *Carden*, 23 Haw. 362 (1916).

law immunities of judges and grand jurors acting within the scope of their duties.[20] These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. One court expressed both considerations as follows:

> "The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a con-

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[20] The immunity of a judge for acts within his jurisdiction has roots extending to the earliest days of the common law. See *Floyd* v. *Barker*, 12 Coke 23, 77 Eng. Rep. 1305 (1608). Chancellor Kent traced some of its history in *Yates* v. *Lansing*, 5 Johns. 282 (N. Y. 1810), and this Court accepted the rule of judicial immunity in *Bradley* v. *Fisher*, 13 Wall. 335 (1872). See n. 12, *supra*. The immunity of grand jurors, an almost equally venerable common-law tenet, see *Floyd* v. *Barker*, *supra*, also has been adopted in this country. See, *e. g.*, *Turpen* v. *Booth*, 56 Cal. 65 (1880); *Hunter* v. *Mathis*, 40 Ind. 356 (1872). Courts that have extended the same immunity to the prosecutor have sometimes remarked on the fact that all three officials—judge, grand juror, and prosecutor—exercise a discretionary judgment on the basis of evidence presented to them. *Smith* v. *Parman*, *supra*; *Watts* v. *Gerking*, *supra*. It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as "quasi-judicial" officers, and their immunities being termed "quasi-judicial" as well. See, *e. g.*, *Turpen* v. *Booth*, *supra*, at 69; *Watts* v. *Gerking*, *supra*, at 661, 228 P., at 138.

> viction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement." *Pearson* v. *Reed*, 6 Cal. App. 2d 277, 287, 44 P. 2d 592, 597 (1935).

See also *Yaselli* v. *Goff*, 12 F. 2d, at 404–406.

B

The common-law rule of immunity is thus well settled.[21] We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983. We think they do.

If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a

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[21] See, *e. g.*, *Gregoire* v. *Biddle*, 177 F. 2d 579 (CA2 1949), cert. denied, 339 U. S. 949 (1950); *Cooper* v. *O'Connor*, 69 App. D. C. 100, 99 F. 2d 135, 140–141 (1938); *Anderson* v. *Rohrer*, 3 F. Supp. 367 (SD Fla. 1933); *Pearson* v. *Reed*, 6 Cal. App. 2d 277, 44 P. 2d 592 (1935); *Anderson* v. *Manley*, 181 Wash. 327, 43 P. 2d 39 (1935). See generally Restatement of Torts § 656 and comment b (1938); 1 F. Harper & F. James, The Law of Torts § 4.3, pp. 305–306 (1956).

suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. *Bradley* v. *Fisher,* 13 Wall., at 348; *Pierson* v. *Ray,* 386 U. S., at 554. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and—ultimately in every case—the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions.[22] The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique

[22] This is illustrated by the history of the disagreement as to the culpability of the prosecutor's conduct in this case. We express no opinion as to which of the courts was correct. See nn. 8 and 9, *supra.*

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and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials. Cf. *Bradley* v. *Fisher*, *supra*, at 349.

The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system. Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence.[23] The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify, as is illustrated by the history of this case. If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.[24]

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[23] In the law of defamation, a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding. In the case of lawyers the privilege extends to their briefs and pleadings as well. See generally 1 T. Cooley, Law of Torts § 153 (4th ed. 1932); 1 F. Harper & F. James, *supra*, § 5.22. In the leading case of *Hoar* v. *Wood*, 44 Mass. 193 (1841), Chief Justice Shaw expressed the policy decision as follows:

"Subject to this restriction [of relevancy], it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions." *Id.*, at 197–198.

[24] A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages. Cf. American Bar Association Project on Stand-

The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to § 1983 liability. Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment.[25]

We conclude that the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper function-

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ards for Criminal Justice, Prosecution and Defense Function § 3.9 (c) (Approved Draft 1971).

[25] The possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation. At trial this duty is enforced by the requirements of due process, but after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction. Cf. ABA Code of Professional Responsibility § EC 7–13 (1969); ABA, Standards, *supra*, § 3.11. Indeed, the record in this case suggests that respondent's recognition of this duty led to the post-conviction hearing which in turn resulted ultimately in the District Court's granting of the writ of habeas corpus.

ing of the criminal justice system.[26] Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:

> "As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950).

See *Yaselli* v. *Goff*, 12 F. 2d, at 404; cf. *Wood* v. *Strickland*, 420 U. S., at 320.[27]

We emphasize that the immunity of prosecutors from

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[26] In addressing the consequences of subjecting judges to suits for damages under § 1983, the Court has commented:

"Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray*, 386 U. S., at 554.

[27] Petitioner contends that his suit should be allowed, even if others would not be, because the District Court's issuance of the writ of habeas corpus shows that his suit has substance. We decline to carve out such an exception to prosecutorial immunity. Petitioner's success on habeas, where the question was the alleged misconduct by several state agents, does not necessarily establish the merit of his civil rights action where only the respondent's alleged wrongdoing is at issue. Certainly nothing determined on habeas would bind respondent, who was not a party. Moreover, using the habeas proceeding as a "door-opener" for a subsequent civil rights action would create the risk of injecting extraneous concerns into that proceeding. As we noted in the text, consideration of the habeas petition could well be colored by an awareness of potential prosecutorial liability.

liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U. S. C. § 242,[28] the criminal analog of § 1983. *O'Shea* v. *Littleton*, 414 U. S. 488, 503 (1974); cf. *Gravel* v. *United States*, 408 U. S. 606, 627 (1972). The prosecutor would fare no better for his willful acts.[29] Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.[30] These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.

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[28] "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

[29] California also appears to provide for criminal punishment of a prosecutor who commits some of the acts ascribed to respondent by petitioner. Cal. Penal Code § 127 (1970); cf. *In re Branch*, 70 Cal. 2d 200, 210–211, 449 P. 2d 174, 181 (1969).

[30] See ABA Code of Professional Responsibility § EC 7–13. See generally ABA, Standards, *supra*, n. 24, §§ 1.1 (c), (e), and Commentary, pp. 44–45.

IV

It remains to delineate the boundaries of our holding. As noted, *supra*, at 416, the Court of Appeals emphasized that each of respondent's challenged activities was an "integral part of the judicial process." 500 F. 2d, at 1302. The purpose of the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status was to distinguish and leave standing those cases, in its Circuit and in some others, which hold that a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's.[31] See *Pierson* v. *Ray*, 386 U. S., at 557. We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force.[32] We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative

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[31] *Guerro* v. *Mulhearn*, 498 F. 2d, at 1256; *Hampton* v. *City of Chicago*, 484 F. 2d, at 608–609; *Robichaud* v. *Ronan*, 351 F. 2d 533, 537 (CA9 1965); cf. *Madison* v. *Purdy*, 410 F. 2d 99 (CA5 1969); *Lewis* v. *Brautigam*, 227 F. 2d 124 (CA5 1955). But cf. *Cambist Films, Inc.* v. *Duggan*, 475 F. 2d 887, 889 (CA3 1973).

[32] Both in his complaint in District Court and in his argument to us, petitioner characterizes some of respondent's actions as "police-related" or investigative. Specifically, he points to a request by respondent of the police during a courtroom recess that they hold off questioning Costello about a pending bad-check charge until after Costello had completed his testimony. Petitioner asserts that this request was an investigative activity because it was a direction to police officers engaged in the investigation of crime. Seen in its proper light, however, respondent's request of the officers was an effort to control the presentation of his witness' testimony, a task fairly within his function as an advocate.

officer rather than that of advocate.[33] We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.[34] The judgment of the Court of Appeals for the Ninth Circuit accordingly is

Affirmed.

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[33] We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

[34] MR. JUSTICE WHITE, concurring in the judgment, would distinguish between willful use by a prosecutor of perjured testimony and willful suppression by a prosecutor of exculpatory information. In the former case, MR. JUSTICE WHITE agrees that absolute immunity is appropriate. He thinks, however, that only a qualified immunity is appropriate where information relevant to the defense is "unconstitutionally *withheld* . . . from the court." *Post*, at 443.

We do not accept the distinction urged by MR. JUSTICE WHITE for several reasons. As a matter of principle, we perceive no less an infringement of a defendant's rights by the knowing use of perjured testimony than by the deliberate withholding of exculpatory information. The conduct in either case is reprehensible, warranting criminal prosecution as well as disbarment. See *supra*, at 429 nn. 29 and 30. Moreover, the distinction is not susceptible of practical application. A claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested. That the two types of claims can thus be viewed is clear from our cases discussing the constitutional prohibitions against both practices. *Mooney* v. *Holohan*, 294

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring in the judgment.

I concur in the judgment of the Court and in much of its reasoning. I agree with the Court that the gravamen of the complaint in this case is that the prosecutor knowingly used perjured testimony; and that a prosecutor is absolutely immune from suit for money damages under 42 U. S. C. § 1983 for presentation of testimony later determined to have been false, where the presentation of such testimony is alleged to have been unconstitutional solely because the prosecutor did not believe it or should not have believed it to be true. I write, however, because I believe that the Court's opinion may be read as

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U. S. 103, 110 (1935); *Alcorta* v. *Texas*, 355 U. S. 28, 31–32 (1957); *Brady* v. *Maryland*, 373 U. S. 83, 86 (1963); *Miller* v. *Pate*, 386 U. S. 1, 4–6 (1967); *Giglio* v. *United States*, 405 U. S. 150, 151–155 (1972). It is also illustrated by the history of this case: at least one of the charges of prosecutorial misconduct discussed by the Federal District Court in terms of suppression of evidence had been discussed by the Supreme Court of California in terms of use of perjured testimony. Compare *Imbler* v. *Craven*, 298 F. Supp., at 809–811, with *In re Imbler*, 60 Cal. 2d, at 566–567, 387 P. 2d, at 12–13. Denying absolute immunity from suppression claims could thus eviscerate, in many situations, the absolute immunity from claims of using perjured testimony.

We further think MR. JUSTICE WHITE's suggestion, *post*, at 440 n. 5, that absolute immunity should be accorded only when the prosecutor makes a "full disclosure" of all facts casting doubt upon the State's testimony, would place upon the prosecutor a duty exceeding the disclosure requirements of *Brady* and its progeny, see 373 U. S., at 87; *Moore* v. *Illinois*, 408 U. S. 786, 795 (1972); cf. *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 647–648 (1974). It also would weaken the adversary system at the same time it interfered seriously with the legitimate exercise of prosecutorial discretion.

extending to a prosecutor an immunity broader than that to which he was entitled at common law; broader than is necessary to decide this case; and broader than is necessary to protect the judicial process. Most seriously, I disagree with any implication that *absolute* immunity for prosecutors extends to suits based on claims of unconstitutional suppression of evidence because I believe such a rule would threaten to *injure* the judicial process and to interfere with Congress' purpose in enacting 42 U. S. C. § 1983, without any support in statutory language or history.

I

Title 42 U. S. C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

As the language itself makes clear, the central purpose of § 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an *official's* abuse of his position." *Monroe* v. *Pape*, 365 U. S. 167, 172 (1961) (emphasis added). The United States Constitution among other things, places substantial limitations upon state action, and the cause of action provided in 42 U. S. C. § 1983 is fundamentally one for "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States* v. *Classic*, 313 U. S. 299, 326 (1941). It is manifest then that all state

officials as a class cannot be immune absolutely from damage suits under 42 U. S. C. § 1983 and that to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create. *Scheuer* v. *Rhodes*, 416 U. S. 232, 243 (1974). Thus, as there is no language in 42 U. S. C. § 1983 extending *any* immunity to any state officials, the Court has not extended *absolute* immunity to such officials in the absence of the most convincing showing that the immunity is necessary. Accordingly, we have declined to construe § 1983 to extend absolute immunity from damage suits to a variety of state officials, *Wood* v. *Strickland*, 420 U. S. 308 (1975) (school board members); *Scheuer* v. *Rhodes*, *supra* (various executive officers, including the State's chief executive officer); *Pierson* v. *Ray*, 386 U. S. 547 (1967) (policemen); and this notwithstanding the fact that, at least with respect to high executive officers, absolute immunity from suit for damages would have applied at common law. *Spalding* v. *Vilas*, 161 U. S. 483 (1896); *Alzua* v. *Johnson*, 231 U. S. 106 (1913). Instead, we have construed the statute to extend only a qualified immunity to these officials, and they may be held liable for unconstitutional conduct absent "good faith." *Wood* v. *Strickland*, *supra*, at 315. Any other result would "deny much of the promise of § 1983." *Id.*, at 322. Nonetheless, there are certain absolute immunities so firmly rooted in the common law and supported by such strong policy reasons that the Court has been unwilling to infer that Congress meant to abolish them in enacting 42 U. S. C. § 1983. Thus, we have held state legislators to be absolutely immune from liability for damages under § 1983 for their legislative acts, *Tenney* v. *Brandhove*, 341 U. S. 367 (1951),[1] and state

[1] The Court emphasized that the immunity had a lengthy history at common law, and was written into the United States Constitution

judges to be absolutely immune from liability for their judicial acts, *Pierson* v. *Ray, supra.*[2]

In justifying absolute immunity for certain officials, both at common law and under 42 U. S. C. § 1983, courts have invariably rested their decisions on the proposition that such immunity is necessary to protect the decision-making process in which the official is engaged. Thus legislative immunity was justified on the ground that such immunity was essential to protect "freedom of speech and action in the legislature" from the dampening effects of threatened lawsuits. *Tenney* v. *Brandhove, supra,* at 372. Similarly, absolute immunity for judges was justified on the ground that no matter how high the standard of proof is set, the burden of defending damage suits brought by disappointed litigants would "contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray, supra,* at 554. In *Bradley* v. *Fisher,* 13 Wall. 335, 347 (1872), the Court stated:

> "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that inde-

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in the "Speech or Debate Clause" and into many state constitutions as well. 341 U. S., at 372–373.

[2] The Court concluded that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in *Bradley* v. *Fisher,* 13 Wall. 335 (1872)." 386 U. S., at 553–554.

pendence without which no judiciary can be either respectable or useful. . . ."

See also cases discussed in *Yaselli* v. *Goff*, 12 F. 2d 396, 399–401 (CA2 1926), summarily aff'd, 275 U. S. 503 (1927).

The majority articulates other adverse consequences which may result from permitting suits to be maintained against public officials. Such suits may expose the official to an unjust damage award, *ante*, at 425; such suits will be expensive to defend even if the official prevails and will take the official's time away from his job, *ante*, at 425; and the liability of a prosecutor for unconstitutional behavior might induce a federal court in a habeas corpus proceeding to deny a valid constitutional claim in order to protect the prosecutor, *ante*, at 427. However, these adverse consequences are present with respect to suits against policemen, school teachers, and other executives, and have never before been thought sufficient to immunize an official absolutely no matter how outrageous his conduct. Indeed, these reasons are present with respect to suits against all state officials [3] and must necessarily have been rejected by Congress as a basis for absolute immunity under 42 U. S. C. § 1983, for its en-

[3] Even the risk that decisions in habeas corpus proceedings will be skewed is applicable in the case of policemen; and if it supplies a sufficient reason to extend absolute immunity to prosecutors, it should have been a sufficient reason to extend such immunity to policemen. Indeed, it is fair to say that far more habeas corpus petitions turn on the constitutionality of action taken by policemen than turn on the constitutionality of action taken by prosecutors. We simply rely on the ability of federal judges correctly to apply the law to the facts with the knowledge that the overturning of a conviction on constitutional grounds hardly dooms the official in question to payment of a damage award in light of the qualified immunity which he possesses, and the inapplicability of the res judicata doctrine, *ante*, at 428 n. 27.

actment is a clear indication that at least some officials should be accountable in damages for their official acts. Thus, unless the threat of suit is also thought to injure the governmental decisionmaking process, the other unfortunate consequences flowing from damage suits against state officials are sufficient only to extend a qualified immunity to the official in question. Accordingly, the question whether a prosecutor enjoys an absolute immunity from damage suits under § 1983, or only a qualified immunity, depends upon whether the common law and reason support the proposition that extending absolute immunity is necessary to protect the *judicial process.*

II

The public prosecutor's absolute immunity from suit at common law is not so firmly entrenched as a judge's, but it has considerable support. The general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution. 1 F. Harper & F. James, The Law of Torts § 4.3, p. 305 n. 7 (1956) (hereafter Harper & James), and cases there cited; *Yaselli* v. *Goff, supra; Gregoire* v. *Biddle,* 177 F. 2d 579 (CA2 1949); *Kauffman* v. *Moss,* 420 F. 2d 1270 (CA3 1970); *Bauers* v. *Heisel,* 361 F. 2d 581 (CA3 1965); *Tyler* v. *Witkowski,* 511 F. 2d 449 (CA7 1975); *Hampton* v. *City of Chicago,* 484 F. 2d 602 (CA7 1973); *Barnes* v. *Dorsey,* 480 F. 2d 1057 (CA8 1973); *Duba* v. *McIntyre,* 501 F. 2d 590 (CA8 1974); *Robichaud* v. *Ronan,* 351 F. 2d 533 (CA9 1965). But see *Leong Yau* v. *Carden,* 23 Haw. 362 (1916). The rule, like the rule extending absolute immunity to judges, rests on the proposition that absolute immunity is necessary to protect the judicial process. Absent immunity, " 'it would be but human that they [prosecutors] might refrain from presenting to a grand jury or prosecuting a matter which in their judgment called for action; but

which a jury might possibly determine otherwise.' " 1 Harper & James § 4.3, pp. 305–306, quoting *Yaselli* v. *Goff*, 8 F. 2d 161, 162 (SDNY 1925). Indeed, in deciding whether or not to prosecute, the prosecutor performs a "quasi-judicial" function. 1 Harper & James 305; *Yaselli* v. *Goff*, 12 F. 2d, at 404. Judicial immunity had always been extended to grand jurors with respect to their actions in returning an indictment, *id.*, at 403, and " 'the public prosecutor, in deciding whether a particular prosecution shall be instituted . . . performs much the same function as a grand jury.' " *Id.*, at 404, quoting *Smith* v. *Parman*, 101 Kan. 115, 165 P. 633 (1917). The analogy to judicial immunity is a strong one. Moreover, the risk of injury to the judicial process from a rule permitting malicious prosecution suits against prosecutors is real. There is no one to sue the prosecutor for an erroneous decision *not* to prosecute. If suits for malicious prosecution were permitted,[4] the prosecutor's incentive would always be not to bring charges. Moreover, the "fear of being harassed by a vexatious suit, for acting according to their consciences" would always be the greater "where powerful" men are involved, 1 W. Hawkins, Pleas of the Crown 349 (6th ed. 1787). Accordingly, I agree with the majority that, with respect to suits based on claims that the prosecutor's decision to prosecute was malicious and without probable cause—at least where there is no independent allegation that the prosecutor withheld exculpatory information from a grand jury or the court, see Part III, *infra*—the judicial process is better served by absolute immunity than by any other rule.

[4] I agree with the majority that it is not sufficient merely to set the standard of proof in a malicious prosecution case very high. If this were done, it might be possible to eliminate the danger of an unjust damage award against a prosecutor. However, the risk of having to *defend* a suit—even if certain of ultimate vindication—would remain a substantial deterrent to fearless prosecution.

Public prosecutors were also absolutely immune at common law from suits for defamatory remarks made during and relevant to a judicial proceeding, 1 Harper & James §§ 5.21, 5.22; *Yaselli* v. *Goff*, 12 F. 2d, at 402–403; and this immunity was also based on the policy of protecting the judicial process. Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Col. L. Rev. 463 (1909). The immunity was not special to public prosecutors but extended to lawyers accused of making false and defamatory statements, or of eliciting false and defamatory testimony from witnesses; and it applied to suits against witnesses themselves for delivering false and defamatory testimony. 1 Harper & James § 5.22, pp. 423–424, and cases there cited; *King* v. *Skinner*, Lofft 55, 98 Eng. Rep. 529, 530 (K. B. 1772) (*per* Lord Mansfield); *Yaselli* v. *Goff*, 12 F. 2d, at 403. The reasons for this rule are also substantial. It is precisely the function of a judicial proceeding to determine where the truth lies. The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be "given every encouragement to make a full disclosure of all pertinent information within their knowledge." 1 Harper & James § 5.22, p. 424. For a witness, this means he must be permitted to testify without fear of being sued if his testimony is disbelieved. For a lawyer, it means that he must be permitted to call witnesses without fear of being sued if the witness is disbelieved and it is alleged that the lawyer knew or should have known that the witness' testimony was false. Of course, witnesses should not be encouraged to testify falsely nor lawyers encouraged to call witnesses who testify falsely. However, if the risk of having to defend a civil damage suit is added to the deterrent against such

conduct already provided by criminal laws against perjury and subornation of perjury, the risk of self-censorship becomes too great. This is particularly so because it is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present. A prosecutor faced with a decision whether or not to call a witness whom he believes, but whose credibility he knows will be in doubt and whose testimony may be disbelieved by the jury, should be given every incentive to submit that witness' testimony to the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.

> "Absolute privilege has been conceded on obvious grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist. It is essential to the ends of justice that all persons participating in judicial proceedings (to take a typical class for illustration) should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences." Veeder, *supra*, 9 Col. L. Rev., at 469.

For the above-stated reasons, I agree with the majority that history and policy support an absolute immunity for prosecutors from suits based solely on claims [5] that they knew or should have known that the testimony of a witness called by the prosecution was false; and I would not attribute to Congress an intention to remove such immunity in enacting 42 U. S. C. § 1983.

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[5] For the reasons set forth in Part III, *infra*, absolute immunity would not apply to independent claims that the prosecutor has withheld facts tending to demonstrate the falsity of his witness' testimony where the alleged facts are sufficiently important to justify a finding of unconstitutional conduct on the part of the prosecutor.

Since the gravamen of the complaint in this case is that the prosecutor knew or should have known that certain testimony of a witness called by him was untrue and since—for reasons set forth below—the other allegations in the complaint fail to state a cause of action on any other theory, I concur in the judgment in this case. However, insofar as the majority's opinion implies an absolute immunity from suits for constitutional violations other than those based on the prosecutor's decision to initiate proceedings or his actions in bringing information or argument to the court, I disagree. Most particularly I disagree with any implication that the absolute immunity extends to suits charging unconstitutional suppression of evidence. *Brady* v. *Maryland*, 373 U. S. 83 (1963).

III

There was no absolute immunity at common law for prosecutors other than absolute immunity from suits for malicious prosecution and defamation. There were simply no other causes of action at common law brought against prosecutors for conduct committed in their official capacity.[6] There is, for example, no reported case of a suit at common law against a prosecutor for suppression or nondisclosure of exculpatory evidence. Thus, even if this Court had accepted the proposition, which

[6] Immunity of public officials for false arrest was, unlike immunity of public officials for malicious prosecution, not absolute, 1 Harper & James §§ 3.17 and 3.18; and when prosecutors were sued for that tort, they were not held absolutely immune. *Schneider* v. *Shepherd*, 192 Mich. 82, 158 N. W. 182 (1916). A similar result has obtained in the lower courts in suits under 42 U. S. C. § 1983 against prosecutors for initiating unconstitutional arrests. *Robichaud* v. *Ronan*, 351 F. 2d 533 (CA9 1965); *Hampton* v. *Chicago*, 484 F. 2d 602 (CA7 1973); *Wilhelm* v. *Turner*, 431 F. 2d 177, 180–183 (CA8 1970) (dictum); *Balistrieri* v. *Warren*, 314 F. Supp. 824 (WD Wis. 1970). See also *Ames* v. *Vavreck*, 356 F. Supp. 931 (Minn. 1973).

it has not, *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), that Congress incorporated in 42 U. S. C. § 1983 all immunities existing at common law, it would not follow that prosecutors are absolutely immune from suit for all unconstitutional acts committed in the course of doing their jobs. Secondly, it is by no means true that such blanket absolute immunity is necessary or even helpful in protecting the judicial process. It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which § 1983 was enacted. Absent special circumstances, such as those discussed in Part II, *supra*, with respect to actions attacking the decision to prosecute or the bringing of evidence or argument to the court, one would expect that the judicial process would be protected—and indeed its integrity enhanced—by denial of immunity to prosecutors who engage in unconstitutional conduct.

The absolute immunity extended to prosecutors in defamation cases is designed to encourage them to bring information to the court which will resolve the criminal case. That is its single justification. Lest they withhold valuable but questionable evidence or refrain from making valuable but questionable arguments, prosecutors are protected from liability for submitting before the court information later determined to have been false to their knowledge.[7] It would stand this immunity rule on its head, however, to apply it to a suit based on a claim that

[7] The reasons for making a prosecutor absolutely immune from suits for defamation would apply with equal force to other suits based solely upon the prosecutor's conduct in the courtroom designed either to bring facts or arguments to the attention of the court. Thus, a prosecutor would be immune from a suit based on a claim that his summation was unconstitutional or that he deliberately elicited hearsay evidence in violation of the Confrontation Clause.

the prosecutor unconstitutionally *withheld* information from the court. Immunity from a suit based upon a claim that the prosecutor suppressed or withheld evidence would *discourage* precisely the disclosure of evidence sought to be encouraged by the rule granting prosecutors immunity from defamation suits. *Denial* of immunity for unconstitutional withholding of evidence would encourage such disclosure. A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required. But, this will hardly injure the judicial process.[8] Indeed, it will help it. Accordingly, lower courts have held that unconstitutional suppression of exculpatory evidence is beyond the scope of "duties constituting an integral part of the judicial process" and have refused to extend absolute immunity to suits based on such claims. *Hilliard* v. *Williams*, 465 F. 2d 1212, 1218 (CA6), cert. denied, 409 U. S. 1029 (1972); *Haaf* v. *Grams*, 355 F. Supp. 542, 545 (Minn. 1973); *Peterson* v. *Stanczak*, 48 F. R. D. 426 (ND Ill. 1969). Contra, *Barnes* v. *Dorsey*, 480 F. 2d 1057 (CA8 1973).

Equally important, unlike constitutional violations committed in the courtroom—improper summations, introduction of hearsay evidence in violation of the Confrontation Clause, knowing presentation of false testimony—which truly are an "integral part of the judicial process," *ante*, at 416, the judicial process has no way to prevent or correct the constitutional violation of suppressing evidence. The judicial process will by definition be ignorant of the violation when it occurs; and it is

[8] There may be circumstances in which ongoing investigations or even the life of an informant might be jeopardized by public disclosure of information thought possibly to be exculpatory. However, these situations may adequately be dealt with by *in camera* disclosure to the trial judge. These considerations do not militate against disclosure, but merely affect the manner of disclosure.

reasonable to suspect that most such violations never surface. It is all the more important, then, to deter such violations by permitting damage actions under 42 U. S. C. § 1983 to be maintained in instances where violations do surface.

The stakes are high. In *Hilliard* v. *Williams, supra,* a woman was convicted of second-degree murder upon entirely circumstantial evidence. The most incriminating item of evidence was the fact that the jacket worn by the defendant at the time of arrest—and some curtains—appeared to have bloodstains on them. The defendant denied that the stains were bloodstains but was convicted and subsequently spent a year in jail. Fortunately, in that case, the defendant later found out that an FBI report—of which the prosecutor had knowledge at the time of the trial and the existence of which he instructed a state investigator not to mention during his testimony—concluded, after testing, that the stains were *not* bloodstains. On retrial, the defendant was acquitted. She sued the prosecutor and the state investigator under 42 U. S. C. § 1983 claiming that the FBI report was unconstitutionally withheld under *Brady* v. *Maryland,* 373 U. S. 83 (1963), and obtained a damage award against both after trial. The prosecutor's petition for certiorari is now pending before this Court. *Hilliard* v. *Williams,* 516 F. 2d 1344 (CA6 1975), cert. pending, No. 75–272. The state investigator's petition, in which he claimed that he had only followed the prosecutor's orders, has been denied. *Clark* v. *Hilliard,* 423 U. S. 1066 (1976). It is apparent that the injury to a defendant which can be caused by an unconstitutional suppression of exculpatory evidence is substantial, particularly if the evidence is never uncovered. It is virtually impossible to identify *any* injury to the judicial process resulting from a rule permitting suits for such unconstitutional

conduct, and it is very easy to identify an injury to the process resulting from a rule which does not permit such suits. Where the reason for the rule extending absolute immunity to prosecutors disappears, it would truly be "monstrous to deny recovery." *Gregoire* v. *Biddle,* 177 F. 2d, at 581.

IV

The complaint in this case, while fundamentally based on the claim that the prosecutor knew or should have known that his witness had testified falsely in certain respects, does contain some allegations that exculpatory evidence and evidence relating to the witness' credibility had been suppressed. Insofar as the complaint is based on allegations of suppression or failure to disclose, the prosecutor should not, for the reasons set forth above, be absolutely immune. However, as the majority notes, the suppression of fingerprint evidence and the alleged suppression of information relating to certain pretrial lineups is not alleged to have been known in fact to the prosecutor—it is simply claimed that the suppression is legally chargeable to him. While this may be so as a matter of federal habeas corpus law, it is untrue in a civil damage action. The result of a lie-detector test claimed to have been suppressed was allegedly known to respondent, but it would have been inadmissible at Imbler's trial and is thus not constitutionally required to be disclosed. The alteration of the police artist's composite sketch after Imbler was designated as the defendant is not alleged to have been suppressed—and in fact appears not to have been suppressed. The opinion of the California Supreme Court on direct review of Imbler's conviction states that "the picture was modified later, following suggestions of Costello and other witnesses," and that court presumably had before it only the trial record. The other items allegedly sup-

pressed all relate to background information about only one of the three eyewitnesses to testify for the State, and were in large part concededly known to the defense and thus may not be accurately described as suppressed. The single alleged fact not concededly known to the defense which might have been helpful to the defense was that the State's witness had written some bad checks for small amounts and that a criminal charge based on one check was outstanding against him. However, the witness had an extensive criminal record which was known to but not fully used by the defense. Thus, even taken as true, the failure to disclose the check charges is patently insufficient to support a claim of unconstitutional suppression of evidence.[9] The Court

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[9] The majority points out that the knowing use of perjured testimony is as reprehensible as the deliberate suppression of exculpatory evidence. This is beside the point. The reason for permitting suits against prosecutors for suppressing evidence is not that suppression is especially reprehensible but that the only effect on the process of permitting such suits will be a beneficial one—more information will be disclosed to the court; whereas one of the effects of permitting suits for knowing use of perjured testimony will be detrimental to the process—prosecutors may withhold questionable but valuable testimony from the court.

The majority argues that any "claim of using perjured testimony simply may be reframed and asserted as a claim of suppression." Our treatment of the allegations in this case conclusively refutes the argument. It is relatively easy to allege that a government witness testified falsely and that the prosecutor did not believe the witness; and, if the prosecutor's subjective belief is a sufficient basis for liability, the case would almost certainly have to go to trial. If such suits were permitted, *this* case would have to go to trial. It is another matter entirely to allege specific objective facts known to the prosecutor of sufficient importance to justify a conclusion that he violated a constitutional duty to disclose. It is no coincidence that petitioner failed to make any such allegations in this case. More to the point—and quite apart from the relative difficulty of pleading a violation of *Brady* v. *Maryland*, 373 U. S. 83

has in the past, having due regard for the fact that the obligation of the government to disclose exculpatory evidence is an exception to the normal operation of an adversary system of justice, imposed on state prosecutors a constitutional obligation to turn over such evidence only when the evidence is of far greater significance than that involved here. See *Moore* v. *Illinois*, 408 U. S. 786 (1972). Thus, the only constitutional violation adequately alleged against the prosecutor is that he knew in his mind that testimony presented by him was false; and from a suit based on such a violation, without more, the prosecutor is absolutely immune. For this reason, I concur in the judgment reached by the majority in this case.

(1963)—a rule permitting suits based on withholding of specific facts unlike suits based on the prosecutor's disbelief of a witness' testimony will have no detrimental effect on the process. Risk of being sued for suppression will impel the prosecutor to err if at all on the side of overdisclosure. Risk of being sued for disbelieving a witness will impel the prosecutor to err on the side of withholding questionable evidence. The majority does not appear to respond to this point. Any suggestion that the distinction between suits based on suppression of facts helpful to the defense and suits based on other kinds of constitutional violations cannot be understood by district judges who would have to apply the rule is mystifying. The distinction is a simple one.

Finally, the majority states that the rule suggested in this concurring opinion "would place upon the prosecutor a duty exceeding the disclosure requirements of *Brady* and its progeny." The rule suggested in this opinion does no such thing. The constitutional obligation of the prosecutor remains utterly unchanged. We would simply not grant him *absolute immunity* from suits for committing violations of pre-existing constitutional disclosure requirements, if he committed those violations in bad faith.

TIME, INC. *v.* FIRESTONE

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 74–944. Argued October 14, 1975—Decided March 2, 1976

After respondent had sought separate maintenance, her husband, the scion of a wealthy industrial family, filed a counterclaim for divorce on grounds of extreme cruelty and adultery. The court granted the counterclaim, stating that "neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida," and that "the marriage should be dissolved." On the basis of newspaper and wire service reports and information from a bureau chief and a "stringer," petitioner published in its magazine an item reporting that the divorce was granted "on grounds of extreme cruelty and adultery." After petitioner had declined to retract, respondent brought this libel action in the state court. A jury verdict for damages against petitioner was ultimately affirmed by the Florida Supreme Court. Petitioner claims that the judgment violates its rights under the First and Fourteenth Amendments. *Held:*

1. The standard enunciated in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, as later extended, which bars media liability for defamation of a public figure absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth, is inapplicable to the facts of this case. Pp. 452–457.

(a) Respondent was not a "public figure," since she did not occupy "[a role] of especial prominence in the affairs of society," and had not been "thrust . . . to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 345. Pp. 453–455.

(b) The *New York Times* rule does not automatically extend to all reports of judicial proceedings regardless of whether the party plaintiff in such proceedings is a public figure who might be assumed to "have voluntarily exposed [himself] to increased risk of injury from defamatory falsehood." *Gertz, supra,* at 345. There is no substantial reason why one involved in litigation should forfeit that degree of protection afforded by the law of defamation simply by virtue of being drawn into a courtroom. Pp. 455–457.

2. No finding was ever made by the divorce court that respondent was guilty of adultery as petitioner had reported, and though petitioner contends that it faithfully reproduced the precise meaning of the divorce judgment, the jury's verdict, upheld on appeal, rejected petitioner's contention that the report was accurate. Pp. 457–459.

3. In a case such as this, *Gertz, supra,* imposes the constitutional limitations that (1) compensatory awards "be supported by competent evidence concerning the injury" and (2) liability cannot be imposed without fault. Since Florida permits damages awards in defamation actions based on elements other than injury to reputation, and there was competent evidence here to permit the jury to assess the amount of such injury, the first of these conditions was satisfied. Pp. 459–461.

4. Since, however, there was no finding of fault on the part of the petitioner in its publication of the defamatory material, the second constitutional limitation imposed by *Gertz* was not met. Though the trial court's failure to submit the question of fault to the jury does not of itself establish noncompliance with the constitutional requirement, none of the Florida courts that considered this case determined that petitioner was at fault. Pp. 461–464.

305 So. 2d 172, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, in which STEWART, J., joined, *post,* p. 464. BRENNAN, J., *post,* p. 471, WHITE, J., *post,* p. 481, and MARSHALL, J., *post,* p. 484, filed dissenting opinions. STEVENS, J., took no part in the consideration or decision of the case.

John H. Pickering argued the cause for petitioner. With him on the briefs were *Harold R. Medina, Jr.,* and *William S. Frates.*

Edna L. Caruso argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner is the publisher of Time, a weekly news magazine. The Supreme Court of Florida affirmed a

$100,000 libel judgment against petitioner which was based on an item appearing in Time that purported to describe the result of domestic relations litigation between respondent and her husband. We granted certiorari, 421 U. S. 909 (1975), to review petitioner's claim that the judgment violates its rights under the First and Fourteenth Amendments to the United States Constitution.

I

Respondent, Mary Alice Firestone, married Russell Firestone, the scion of one of America's wealthier industrial families, in 1961. In 1964, they separated, and respondent filed a complaint for separate maintenance in the Circuit Court of Palm Beach County, Fla. Her husband counterclaimed for divorce on grounds of extreme cruelty and adultery. After a lengthy trial the Circuit Court issued a judgment granting the divorce requested by respondent's husband. In relevant part the court's final judgment read:

> "This cause came on for final hearing before the court upon the plaintiff wife's second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery, and the wife's answer thereto setting up certain affirmative defenses. . . .
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> . . . . . .
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> "According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another

with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida . . . .

. . . . . .

"In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.

. . . . . .

"The premises considered, it is thereupon

"ORDERED AND ADJUDGED as follows:

"1. That the equities in this cause are with the defendant; that defendant's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved.

. . . . . .

"4. That the defendant shall pay unto the plaintiff the sum of $3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every month thereafter until the death or remarriage of the plaintiff." App. 523–525, 528.

Time's editorial staff, headquartered in New York, was alerted by a wire service report and an account in a New York newspaper to the fact that a judgment had been rendered in the Firestone divorce proceeding. The staff subsequently received further information regarding the Florida decision from Time's Miami bureau chief and from a "stringer" working on a special assignment basis in the Palm Beach area. On the basis of these four sources, Time's staff composed the following item,

which appeared in the magazine's "Milestones" section the following week:

> "DIVORCED. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'"

Within a few weeks of the publication of this article respondent demanded in writing a retraction from petitioner, alleging that a portion of the article was "false, malicious and defamatory." Petitioner declined to issue the requested retraction.[1]

Respondent then filed this libel action against petitioner in the Florida Circuit Court. Based on a jury verdict for respondent, that court entered judgment against petitioner for $100,000, and after review in both the Florida District Court of Appeal and the Supreme Court of Florida the judgment was ultimately affirmed. 305 So. 2d 172 (1974). Petitioner advances several contentions as to why the judgment is contrary to decisions of this Court holding that the First and Fourteenth Amendments of the United States Constitution limit the authority of state courts to impose liability for damages based on defamation.

II

Petitioner initially contends that it cannot be liable for publishing any falsehood defaming respondent unless

[1] Under Florida law the demand for retraction was a prerequisite for filing a libel action, and permits defendants to limit their potential liability to actual damages by complying with the demand. Fla. Stat. Ann. §§ 770.01–770.02 (1963).

it is established that the publication was made "with actual malice," as that term is defined in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).[2] Petitioner advances two arguments in support of this contention: that respondent is a "public figure" within this Court's decisions extending *New York Times* to defamation suits brought by such individuals, see, *e. g.*, *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967); and that the Time item constituted a report of a judicial proceeding, a class of subject matter which petitioner claims deserves the protection of the "actual malice" standard even if the story is proved to be defamatorily false or inaccurate. We reject both arguments.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 345 (1974), we have recently further defined the meaning of "public figure" for the purposes of the First and Fourteenth Amendments:

> "For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.

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[2] The "actual malice" test requires that a plaintiff prove that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S., at 280.

Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause célèbre," it must have been a public controversy and respondent must be considered a public figure. But in so doing petitioner seeks to equate "public controversy" with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz*, however, the Court repudiated this position, stating that "extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [a] legitimate state interest to a degree that we find unacceptable." 418 U. S., at 346.

Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance "[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Boddie* v. *Connecticut*, 401 U. S. 371, 376–377 (1971). Her actions, both in instituting the litigation and in its conduct, were quite different from those of General Walker in *Curtis Publishing Co., supra.*[3] She assumed no "special promi-

[3] Nor do we think the fact that respondent may have held a few press conferences during the divorce proceedings in an attempt to

nence in the resolution of public questions." *Gertz, supra,* at 351. We hold respondent was not a "public figure" for the purpose of determining the constitutional protection afforded petitioner's report of the factual and legal basis for her divorce.

For similar reasons we likewise reject petitioner's claim for automatic extension of the *New York Times* privilege to all reports of judicial proceedings. It is argued that information concerning proceedings in our Nation's courts may have such importance to all citizens as to justify extending special First Amendment protection to the press when reporting on such events. We have recently accepted a significantly more confined version of this argument by holding that the Constitution precludes States from imposing civil liability based upon the publication of truthful information contained in official court records open to public inspection. *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975).

Petitioner would have us extend the reasoning of *Cox Broadcasting* to safeguard even inaccurate and false statements, at least where "actual malice" has not been established. But its argument proves too much. It may be that all reports of judicial proceedings contain some informational value implicating the First Amendment, but recognizing this is little different from labeling all judicial proceedings matters of "public or general interest," as that phrase was used by the plu-

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satisfy inquiring reporters converts her into a "public figure." Such interviews should have had no effect upon the merits of the legal dispute between respondent and her husband or the outcome of that trial, and we do not think it can be assumed that any such purpose was intended. Moreover, there is no indication that she sought to use the press conferences as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution. See *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 345 (1974).

rality in *Rosenbloom*. Whatever their general validity, use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff. See 418 U. S., at 344–346. By confining inquiry to whether a plaintiff is a public officer or a public figure who might be assumed to "have voluntarily exposed [himself] to increased risk of injury from defamatory falsehood," we sought a more appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances. Cf. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942).

Presumptively erecting the *New York Times* barrier against all plaintiffs seeking to recover for injuries from defamatory falsehoods published in what are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the First Amendment. And in some instances such an undiscriminating approach might achieve results directly at odds with the constitutional balance intended. Indeed, the article upon which the *Gertz* libel action was based purported to be a report on the murder trial of a Chicago police officer. See 418 U. S., at 325–326. Our decision in that case should make it clear that no such blanket privilege for reports of judicial proceedings is to be found in the Constitution.

It may be argued that there is still room for application of the *New York Times* protections to more nar-

rowly focused reports of what actually transpires in the courtroom. But even so narrowed, the suggested privilege is simply too broad. Imposing upon the law of private defamation the rather drastic limitations worked by *New York Times* cannot be justified by generalized references to the public interest in reports of judicial proceedings. The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times.* See 376 U. S., at 270; cf. *Rosenblatt* v. *Baer,* 383 U. S. 75, 86 (1966). And while participants in some litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom. The public interest in accurate reports of judicial proceedings is substantially protected by *Cox Broadcasting Co., supra.* As to inaccurate and defamatory reports of facts, matters deserving no First Amendment protection, see 418 U. S., at 340, we think *Gertz* provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault.

III

Petitioner has urged throughout this litigation that it could not be held liable for publication of the "Milestones" item because its report of respondent's divorce

was factually correct. In its view the Time article faithfully reproduced the precise meaning of the divorce judgment. But this issue was submitted to the jury under an instruction intended to implement Florida's limited privilege for accurate reports of judicial proceedings. App. 509; see 305 So. 2d, at 177. By returning a verdict for respondent the jury necessarily found that the identity of meaning which petitioner claims does not exist even for laymen. The Supreme Court of Florida upheld this finding on appeal, rejecting petitioner's contention that its report was accurate as a matter of law. Because demonstration that an article was true would seem to preclude finding the publisher at fault, see *Cox Broadcasting Co.*, 420 U. S., at 498–500 (POWELL, J., concurring), we have examined the predicate for petitioner's contention. We believe the Florida courts properly could have found the "Milestones" item to be false.

For petitioner's report to have been accurate, the divorce granted Russell Firestone must have been based on a finding by the divorce court that his wife had committed extreme cruelty toward him *and* that she had been guilty of adultery. This is indisputably what petitioner reported in its "Milestones" item, but it is equally indisputable that these were not the facts. Russell Firestone alleged in his counterclaim that respondent had been guilty of adultery, but the divorce court never made any such finding. Its judgment provided that Russell Firestone's "counterclaim for divorce be and the same is hereby granted," but did not specify that the basis for the judgment was either of the two grounds alleged in the counterclaim. The Supreme Court of Florida on appeal concluded that the ground actually relied upon by the divorce court was "lack of domestication of the parties," a ground not theretofore recognized by Florida law. The Supreme Court nonetheless affirmed the judgment dissolving the bonds of matrimony

because the record contained sufficient evidence to establish the ground of extreme cruelty. *Firestone* v. *Firestone*, 263 So. 2d 223, 225 (1972).

Petitioner may well argue that the meaning of the trial court's decree was unclear,[4] but this does not license it to choose from among several conceivable interpretations the one most damaging to respondent. Having chosen to follow this tack,[5] petitioner must be able to establish not merely that the item reported was a conceivable or plausible interpretation of the decree, but that the item was factually correct. We believe there is ample support for the jury's conclusion, affirmed by the Supreme Court of Florida, that this was not the case. There was, therefore, sufficient basis for imposing liability upon petitioner if the constitutional limitations we announced in *Gertz* have been satisfied. These are a prohibition against imposing liability without fault, 418 U. S., at 347, and the requirement that compensatory awards "be supported by competent evidence concerning the injury." *Id.*, at 350.

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[4] Petitioner is incorrect in arguing that a rational interpretation of an ambiguous document is constitutionally protected under our decision in *Time, Inc.* v. *Pape*, 401 U. S. 279 (1971). There we were applying the *New York Times* standard to test whether the defendant had acted in reckless disregard of the truth. *Id.*, at 292. But as we have concluded that the publication in this case need not be tested against the "actual malice" standard, *Pape* is of no assistance to petitioner.

[5] In fact, it appears that none of petitioner's employees actually saw the decree prior to publication of the "Milestones" article. But we do not think this can affect the extent of constitutional protection afforded the statement. Moreover, petitioner has maintained throughout that it would have published an identical statement if its editorial staff had had an opportunity to peruse the judgment prior to their publication deadline, and has consistently contended that its article was true when compared to the words of that judgment.

As to the latter requirement little difficulty appears. Petitioner has argued that because respondent withdrew her claim for damages to reputation on the eve of trial, there could be no recovery consistent with *Gertz*. Petitioner's theory seems to be that the only compensable injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation. But Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in *Gertz*. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing "personal humiliation, and mental anguish and suffering" as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.

The trial court charged, consistently with *Gertz*, that the jury should award respondent compensatory damages in "an amount of money that will fairly and adequately compensate her for such damages," and further cautioned that "[i]t is only damages which are a direct and natural result of the alleged libel which may be recovered." App. 509. There was competent evidence introduced to permit the jury to assess the amount of injury. Several witnesses [6] testified to the extent of re-

[6] These included respondent's minister, her attorney in the divorce proceedings, plus several friends and neighbors, one of whom was a physician who testified to having to administer a sedative to

spondent's anxiety and concern over Time's inaccurately reporting that she had been found guilty of adultery, and she herself took the stand to elaborate on her fears that her young son would be adversely affected by this falsehood when he grew older. The jury decided these injuries should be compensated by an award of $100,000. We have no warrant for re-examining this determination. Cf. *Lincoln* v. *Power,* 151 U. S. 436 (1894).

IV

Gertz established, however, that not only must there be evidence to support an award of compensatory damages, there must also be evidence of some fault on the part of a defendant charged with publishing defamatory material. No question of fault was submitted to the jury in this case, because under Florida law the only findings required for determination of liability were whether the article was defamatory, whether it was true, and whether the defamation, if any, caused respondent harm.

The failure to submit the question of fault to the jury does not of itself establish noncompliance with the constitutional requirements established in *Gertz,* however. Nothing in the Constitution requires that assessment of fault in a civil case tried in a state court be made by a jury, nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial, court. The First and Fourteenth Amendments do not impose upon the States any limitations as to how, within their own judicial systems, factfinding tasks shall be allocated. If we were satisfied that one of the Florida courts which considered this case had supportably ascertained petitioner

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respondent in an attempt to reduce discomfort wrought by her worrying about the article.

was at fault, we would be required to affirm the judgment below.

But the only alternative source of such a finding, given that the issue was not submitted to the jury, is the opinion of the Supreme Court of Florida. That opinion appears to proceed generally on the assumption that a showing of fault was not required,[7] but then in the penultimate paragraph it recites:

> "Furthermore, this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. Gertz v. Welch, Inc., supra. Pursuant to Florida law in effect at the time of the divorce judgment (Section 61.08, Florida Statutes), a wife found guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the

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[7] After reiterating its conclusion that the article was false, the Florida court noted that falsely accusing a woman of adultery is libelous *per se* and normally actionable without proof of damages. The court then recognized that our opinion in *Gertz* necessarily displaced this presumption of damages but ruled that the trial court's instruction was consistent with *Gertz* and that there was evidence to support the jury's verdict—conclusions with which we have agreed. The court went on to reject a claim of privilege under state law, pointing out that the privilege shielded only "fair and accurate" reports and the jury had resolved these issues against petitioner. The court appears to have concluded its analysis of petitioner's legal claims with this statement, which immediately precedes the paragraph set out in the text:

"Careful examination and consideration of the record discloses that the judgment of the trial court is correct and should have been affirmed on appeal to the District Court." 305 So. 2d, at 177–178.

There is nothing in the court's opinion which appears to make any reference to the relevance of some concept of fault in determining petitioner's liability.

> divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of 'journalistic negligence.'" 305 So. 2d, at 178.

It may be argued that this is sufficient indication the court found petitioner at fault within the meaning of *Gertz*. Nothing in that decision or in the First or Fourteenth Amendment requires that in a libel action an appellate court treat in detail by written opinion all contentions of the parties, and if the jury or trial judge had found fault in fact, we would be quite willing to read the quoted passage as affirming that conclusion. But without some finding of fault by the judge or jury in the Circuit Court, we would have to attribute to the Supreme Court of Florida from the quoted language not merely an intention to affirm the finding of the lower court, but an intention to find such a fact in the first instance.

Even where a question of fact may have constitutional significance, we normally accord findings of state courts deference in reviewing constitutional claims here. See, *e. g.*, *Lyons* v. *Oklahoma*, 322 U. S. 596, 602–603 (1944); *Gallegos* v. *Nebraska*, 342 U. S. 55, 60–61 (1951) (opinion of Reed, J.). But that deference is predicated on our belief that at some point in the state proceedings some factfinder has made a conscious determination of the existence or nonexistence of the critical fact. Here the record before us affords no basis for such a conclusion.

It may well be that petitioner's account in its "Milestones" section was the product of some fault on its part,

and that the libel judgment against it was, therefore, entirely consistent with *Gertz*. But in the absence of a finding in some element of the state-court system that there was fault, we are not inclined to canvass the record to make such a determination in the first instance. Cf. *Rosenblatt* v. *Baer*, 383 U. S., at 87–88. Accordingly, the judgment of the Supreme Court of Florida is vacated and the case remanded for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, concurring.

A clear majority of the Court adheres to the principles of *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). But it is evident from the variety of views expressed that perceptions differ as to the proper application of such principles to this bizarre case. In order to avoid the appearance of fragmentation of the Court on the basic principles involved, I join the opinion of the Court. I add this concurrence to state my reaction to the record presented for our review.

In *Gertz* we held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.*, at 347. Thus, while a State may elect to hold a publisher to a lesser duty of care,[1] there is no First Amendment constraint against

[1] A State, if it elected to do so, could require proof of gross negligence before holding a publisher or broadcaster liable for defamation. In *Gertz*, we concluded "that the States should re-

allowing recovery upon proof of negligence. The applicability of such a fault standard was expressly limited to circumstances where, as here, "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" [2] *Id.*, at 348, quoting *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967). By requiring a showing of fault the Court in *Gertz* sought to shield the press and broadcast media from a rule of strict liability that could lead to intolerable self-censorship and at the same time recognize the legitimate state interest in compensating private individuals for wrongful injury from defamatory falsehoods.

In one paragraph near the end of its opinion, the Supreme Court of Florida cited *Gertz* in concluding that Time was guilty of "journalistic negligence." But, as the opinion of the Court recognizes, *ante*, at 462 n. 7, and 463, it is not evident from this single paragraph that any type of fault standard was in fact applied. Assuming that Florida now will apply a negligence standard in cases of this kind, the ultimate question here is whether Time exercised due care under the circumstances: Did Time exercise the reasonably prudent care that a State may constitutionally demand of a publisher or broadcaster prior to a publication whose content reveals its defamatory potential?

The answer to this question depends upon a careful consideration of all the relevant evidence concerning Time's actions prior to the publication of the

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tain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." 418 U. S., at 345–346.

[2] In amplification of this limitation, we referred to the type of "factual misstatement whose content [does] not warn a reasonably prudent editor or broadcaster of its defamatory potential." *Id.*, at 348.

"Milestones" article. But in its conclusory paragraph finding negligence, the Supreme Court of Florida mentioned only the provision of Florida law that proscribed an award of alimony to a wife found guilty of adultery, arguing that the award of alimony to respondent clearly demonstrated that the divorce was granted on other grounds. There is no recognition in the opinion of the ambiguity of the divorce decree and no discussion of any of the efforts made by Time to verify the accuracy of its news report. Nor was there any weighing of the evidence to determine whether there was actionable negligence by Time under the *Gertz* standard.[3]

There was substantial evidence, much of it uncontradicted, that the editors of Time exercised considerable care in checking the accuracy of the story prior to its publication. The "Milestones" item appeared in the December 22, 1967, issue of Time. This issue went to press on Saturday, December 16, the day after the Circuit Court rendered its decision at about 4:30 in the afternoon. The evening of the 15th the Time editorial staff in New York received an Associated Press dispatch stating that Russell A. Firestone, Jr., had been granted a divorce from his third wife, whom "he had accused of adultery and extreme cruelty." Later that same evening, Time received the New York Daily News edition for December 16, which carried a special bulletin substantially to the same effect as the AP dispatch.

On the morning of December 16, in response to an inquiry sent to its Miami bureau, Time's New York office received a dispatch from the head of that bureau quoting excerpts from the Circuit Court's opinion that

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[3] The absence of any assessment of fault under the *Gertz* standard by the Supreme Court of Florida is fatal here because there was no such finding at any other level of judgment in this proceeding. *Ante*, at 461–463, and n. 7.

strongly suggested adultery on the part of both parties.[4] Later that day the editorial staff received a message from Time's Palm Beach "stringer" that read, in part: "The technical grounds for divorce according to Joseph Farrish [*sic*], Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultry [*sic*]." App. 532. The stringer's dispatch also included several quotations from the Circuit Court opinion.[5] At trial the senior editor testified that although no member of the New York editorial staff had read the Circuit Court's opinion, he had believed that both the stringer and the chief of Time's Miami bureau had read it.

The opaqueness of the Circuit Court's decree is also a factor to be considered in assessing whether Time was guilty of actionable fault under the *Gertz* standard. Although it appears that neither the head of the Miami bureau nor the stringer personally read the opinion or order, the stringer testified at trial that respondent's attorney Farish and others read him portions of the decree over the telephone before he filed his dispatch with Time.[6] The record does not reveal whether

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[4] The excerpts included: "'According to certain testimony in behalf of the defendant [husband], extra marital escapades of the plaintiff [wife] were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in the plaintiff's behalf, would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr.'" App. 544.

[5] Based on these news items and dispatches, the Time editorial team, consisting of a researcher, writer, and senior editor in charge of the "Milestones" section of the magazine, wrote, edited, and checked the article for accuracy. At trial they testified as to their complete belief in the truth of the news item at the time of publication.

[6] Several hours after filing his dispatch, the stringer spoke with the divorce judge by telephone. According to testimony of the stringer at trial the divorce judge read him portions of the decree, and none of this information was inconsistent with that contained

the limited portions of the decree that shed light on the grounds for the granting of the divorce were read to the stringer.[7] But the ambiguity of the divorce decree may well have contributed to the stringer's view, and hence the Time editorial staff's conclusion, that a ground for the divorce was adultery by respondent.

However one may characterize it, the Circuit Court decision was hardly a model of clarity. Its opening sentence was as follows:

> "This cause came on for final hearing before the court upon the plaintiff wife's second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery, and the wife's answer thereto setting up certain affirmative defenses." App. 523.

After commenting on the conflicting testimony as to respondent's "extra marital escapades" and her husband's "bounding from one bedpartner to another," the opinion states that "it is the conclusion and finding of the court that neither party is domesticated . . . ." Finally, the Circuit Court "ORDERED AND ADJUDGED":

> "That the equities in this cause are with the de-

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in his dispatch to Time; otherwise, he would have alerted Time's New York office immediately.

[7] Time did not consider the stringer to be an employee. He worked for Time part time and was compensated at an hourly rate, although he was guaranteed a minimum amount of work each year. In this case, he was contacted by the chief of the Miami bureau and requested to investigate the Firestone divorce decree. There is thus a question whether the fault, if any, of the stringer in not personally reading the entire opinion and order, is even a factor that may be considered in assessing whether there was actionable fault by Time under *Gertz*. Cf. *Cantrell* v. *Forest City Publishing Co.*, 419 U. S. 245, 253–254 (1974).

> fendant; that defendant's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved." App. 528.

The remaining paragraphs in the order portion of the decision relate to child custody and support, disposition of certain property, attorney's fees, and the award of $3,000 per month to the wife (respondent) as alimony. There is no reference whatever in the "order" portion of the decision either to "extreme cruelty" or "adultery," the only grounds relied upon by the husband. But the divorce was granted to him following an express finding "that the equities . . . are with the defendant [the husband]."

Thus, on the face of the opinion itself, the husband had counterclaimed for divorce on the grounds of extreme cruelty and adultery, and the court had found the equities to be with him and had granted his counterclaim for divorce. Apart from the awarding of alimony to the wife there is no indication, either in the opinion or accompanying order, that the husband's counterclaim was not granted on both of the grounds asserted. This may be a redundant reading, as either ground would have sufficed. But the opinion that preceded the order was full of talk of adultery and made no explicit reference to any other type of cruelty. In these circumstances, the decision of the Circuit Court may have been sufficiently ambiguous to have caused reasonably prudent newsmen to read it as granting divorce on the ground of adultery.

As I join the opinion of the Court remanding this case, it is unnecessary to decide whether the foregoing establishes as a matter of law that Time exercised the requisite care under the circumstances. Nor have I undertaken to identify all of the evidence that may be relevant or to

point out conflicts that arguably have been resolved against Time by the jury. My point in writing is to emphasize that, against the background of a notorious divorce case, see *Curtis Publishing Co.*, 388 U. S., at 158–159,[8] and a decree that invited misunderstanding, there *was* substantial evidence supportive of Time's defense that it was not guilty of actionable negligence. At the very least the jury or court assessing liability in this case should have weighed these factors and this evidence before reaching a judgment.[9] There is no indication in the record before us that this was done in accordance with *Gertz*.[10]

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[8] In its first opinion remanding the case to the District Court of Appeal, after referring to the general prominence of the Firestones, the Supreme Court of Florida indicated that "their marital difficulties were equally well known; and the charges and countercharges of meretriciousness, flowing from both sides of the controversy, made their divorce action a veritable *cause celebre* in social circles across the country." 271 So. 2d 745, 751 (1972). The District Court of Appeal similarly observed that in part due to the sensational and colorful testimony the 17-month divorce trial had been the object of national news coverage. 254 So. 2d 386, 389 (1971). The reports Time received that the decree was granted on the ground of adultery therefore were consistent with the well-publicized trial revelations.

[9] Indeed, I agree with the view expressed by MR. JUSTICE MARSHALL in his dissenting opinion: Unless there exists some basis for a finding of fault other than that given by the Supreme Court of Florida there can be no liability.

[10] The Florida District Court of Appeal, on the second appeal to it, reversed a judgment for respondent. In doing so, it applied the *New York Times* "actual malice" standard, but added: "Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth." 254 So. 2d, at 390. A problem infecting the various decisions in the Florida courts is the understandable uncertainty as to exactly what standard should be applied. This case was in litigation several years before *Gertz* was decided.

MR. JUSTICE BRENNAN, dissenting.

In my view, the question presented by this case is the degree of protection commanded by the First Amendment's free expression guarantee where it is sought to hold a publisher liable under state defamation laws for erroneously reporting the results of a public judicial proceeding.

I

In a series of cases beginning with *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), this Court has held that the laws of libel and defamation, no less than other legal modes of restraint on the freedoms of speech and press, are subject to constitutional scrutiny under the First Amendment. The Court has emphasized that the central meaning of the free expression guarantee is that the body politic of this Nation shall be entitled to the communications necessary for self-governance, and that to place restraints on the exercise of expression is to deny the instrumental means required in order that the citizenry exercise that ultimate sovereignty reposed in its collective judgment by the Constitution.[1] Accordingly, we have held that laws governing harm incurred by individuals through defamation or invasion of privacy, although directed to the worthy objective of ensuring the "essential dignity and worth of every human being" necessary to a civilized society, *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (STEWART, J., concurring), must be measured and limited by constitutional con-

[1] See Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191; Meiklejohn, The First Amendment Is An Absolute, 1961 Sup. Ct. Rev. 245. See also Bloustein, The First Amendment and Privacy: The Supreme Court Justice and the Philosopher, 28 Rutgers L. Rev. 41 (1974); Meiklejohn, Public Speech in the Supreme Court Since New York Times v. Sullivan, 26 Syracuse L. Rev. 819 (1975).

straints assuring the maintenance and well-being of the system of free expression. Although "calculated falsehood" is no part of the expression protected by the central meaning of the First Amendment, *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964), error and misstatement is recognized as inevitable in any scheme of truly free expression and debate. *New York Times*, *supra*, at 271–272. Therefore, in order to avoid the self-censorship that would necessarily accompany strict or simple fault liability for erroneous statements, rules governing liability for injury to reputation are required to allow an adequate margin for error—protecting some misstatements so that the "freedoms of expression . . . have the 'breathing space' that they 'need . . . to survive.'" *Ibid.* "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant* v. *Thompson*, 390 U. S. 727, 732 (1968). For this reason, *New York Times* held that liability for defamation of a public official may not be imposed in the absence of proof of actual malice on the part of the person making the erroneous statement. 376 U. S., at 279–280.[2]

[2] The protection of the actual-malice test extends to erroneous statements that in any way "might touch on . . . [the] fitness for office" of a public official, *Garrison* v. *Louisiana*, 379 U. S. 64, 77 (1964), or a candidate for public office, *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 274 (1971). The actual-malice standard has been applied "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," *Rosenblatt* v. *Baer*, 383 U. S. 75, 85 (1966), and further to "public figures" who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 164 (1967) (Warren, C. J., concurring in result).

As an erroneous judgment of liability is, in view of the First

Identical considerations led the Court last Term in *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), to hold that the First Amendment commands an absolute privilege to truthfully report the contents of public records reflecting the subject matter of judicial proceedings. Recognizing the possibility of injury to legitimate privacy interests of persons affected by such proceedings, the Court was nevertheless constrained in light of the strong First Amendment values involved to conclude that no liability whatever could be imposed by the State for reports damaging to those concerns. Following the reasoning of *New York Times* and its progeny, the Court in *Cox Broadcasting* noted:

> "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of govern-

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Amendment values at stake, of more serious concern than an erroneous judgment in the opposite direction, *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 50 (1971), the Court has held that actual malice must be demonstrated with "convincing clarity." *New York Times*, 376 U. S., at 285–286. The actual-malice standard requires a showing that the erroneous statements were made in knowing or reckless disregard of their falsity, *id.*, at 280, and has been otherwise defined as requiring a showing that the statements were made by a person who in fact was entertaining "serious doubts" as to their truth. *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968).

ment generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. . . .

. . . . . .

". . . Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." 420 U. S., at 491–492, 495.

Crucial to the holding in *Cox Broadcasting* was the determination that a "reasonable man" standard for imposing liability for invasion of privacy interests is simply inadequate to the task of safeguarding against "timidity and self-censorship" in reporting judicial proceedings. *Id.*, at 496. Clearly, the inadequacy of any such standard is no less in the related area of liability for defamation resulting from inadvertent error in reporting such proceedings.

II

It is true, of course, that the Court in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), cut back on the scope of application of the *New York Times* privilege as it had evolved through the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971). *Rosenbloom* had held the *New York Times* privilege applicable to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." 403 U. S., at 44. But in light of the Court's percep-

tion of an altered balance between the conflicting values at stake where the person defamed is in some sense a "private individual," *Gertz, supra,* at 347, 349–350, held First Amendment interests adequately protected in such circumstances so long as defamation liability is restricted to a requirement of "fault" and proof of "actual injury" resulting from the claimed defamation.[3] 418 U. S.,

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[3] In this case, the $100,000 damage award was premised entirely on the injury of mental pain and anguish. All claims as to injury to reputation were withdrawn prior to trial, and no evidence concerning damage to reputation was presented at trial. (Indeed, it appears that petitioner was affirmatively precluded from offering evidence to refute any possible jury assumption in this regard by a pretrial order granting "Plaintiff's Motion to Limit Testimony," App. 77.) It seems clear that by allowing this type of recovery the State has subverted whatever protective influence the "actual injury" stricture may possess. *Gertz* would, of course, allow for an award of damages for such injury after proof of injury to reputation. 418 U. S., at 349–350. But to allow such damages without proof "by competent evidence" of any other "actual injury" is to do nothing less than return to the old rule of presumed damages supposedly outlawed by *Gertz* in instances where the *New York Times* standard is not met. 418 U. S., at 349. See Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 472–473 (1975); Eaton, The American Law of Defamation through *Gertz* v. *Robert Welch, Inc.* and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1436–1437 (1975). The result is clearly to invite "gratuitous awards of money damages far in excess of any actual injury" and jury punishment of "unpopular opinion rather than [compensation to] individuals for injury sustained by the publication of a false fact." *Gertz, supra,* at 349.

Furthermore, the allowance of damages for mental suffering alone will completely abrogate the use of summary judgment procedures in defamation litigation. Cf. Anderson, *supra,* at 469 n. 218. The use of such summary procedures may be a critical factor enabling publishers to avoid large litigation expenses in marginal and frivolous defamation suits. The specter of such expenses may be as potent a force for self-censorship as any threat of an ultimate damages award. See generally *ibid.*

at 349–350. However, the extension of the relaxed standard of *Gertz* to news reporting of events transpiring in and decisions arising out of public judicial proceedings is unwarranted by the terms of *Gertz* itself, is contrary to other well-established precedents of this Court and, most importantly, savages the cherished values encased in the First Amendment.

There is no indication in *Gertz* of any intention to overrule the *Rosenbloom* decision on its facts. Confined to those facts, *Rosenbloom* holds that in instances of erroneous reporting of the public actions of public officials, the *New York Times* actual-malice standard must be met before liability for defamation may be imposed in favor of persons affected by those actions. Although *Gertz* clearly altered the broader rationale of *Rosenbloom*, until the Court's decision today it could not have been supposed that *Rosenbloom* did not remain the law roughly to the extent of my Brother WHITE's concurring statement therein:

> "[I]n defamation actions, absent actual malice as defined in *New York Times Co.* v. *Sullivan*, the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view." 403 U. S., at 62.[4]

At stake in the present case is the ability of the press to report to the citizenry the events transpiring in the Nation's judicial systems. There is simply no meaningful

[4] Cf. Anderson, *supra*, n. 3, at 450–451, concluding that the *Gertz* opinion suggests a "category of involuntary public figures" roughly equivalent to "individual[s] involved in or affected by . . . official action" as defined by my Brother WHITE in *Rosenbloom*, 403 U. S., at 62.

or constitutionally adequate way to report such events without reference to those persons and transactions that form the subject matter in controversy.[5] This Court has long held:

> "A trial is a public event. What transpires in the court room is public property . . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Craig* v. *Harney,* 331 U. S. 367, 374 (1947).[6]

The Court has recognized that with regard to the judiciary, no less than other areas of government, the press performs an indispensable role by "subjecting the . . . judicial processes to extensive public scrutiny and criticism." *Sheppard* v. *Maxwell,* 384 U. S. 333, 350 (1966). And it is critical that the judicial processes be open to such scrutiny and criticism, for, as the Court has noted in the specific context of labor disputes, the more acute public controversies are, "the more likely it is that in some aspect they will get into court." *Bridges* v. *California,* 314 U. S. 252, 268–269 (1941).[7] Indeed, slight

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[5] Cf. *Rosenbloom* v. *Metromedia, Inc., supra,* at 61 (WHITE, J., concurring):

"Discussion of the conduct of public officials cannot . . . be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place."

[6] *Craig* also refutes any contention that private civil litigation is somehow different in this respect. 331 U. S., at 378.

[7] An early and sympathetic observer of our Nation's political system commented:

"The judicial organization of the United States is the institution

reflection is needed to observe the insistent and complex interaction between controversial judicial proceedings and popular impressions thereof and fundamental legal and political changes in the Nation throughout the 200 years of evolution of our political system. With the judiciary as with all other aspects of government, the First Amendment guarantees to the people of this Nation that they shall retain the necessary means of control over their institutions that might in the alternative grow remote, insensitive, and finally acquisitive of those attributes of sovereignty not delegated by the Constitution.[8]

Also no less true than in other areas of government, error in reporting and debate concerning the judicial process is inevitable. Indeed, in view of the complexities of that process and its unfamiliarity to the laymen

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which a stranger has the greatest difficulty in understanding. He hears the authority of a judge invoked in the political occurrences of every day, and he naturally concludes that in the United States the judges are important political functionaries; nevertheless, when he examines the nature of the tribunals, they offer at the first glance nothing that is contrary to the usual habits and privileges of those bodies; and the magistrates seem to him to interfere in public affairs only by chance, but by a chance that recurs every day.

. . . . .

"Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 A. de Tocqueville, Democracy in America 98, 280 (P. Bradley ed. 1948).

[8] Even those who would narrowly confine the central meaning of the First Amendment to "explicitly political speech" recognize that this must extend to all speech "concerned with governmental behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative." Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1, 27–28 (1971).

who report it, the probability of inadvertent error may be substantially greater.[9]

> "There is perhaps no area of news more inaccurately reported factually, on the whole, though with some notable exceptions, than legal news.

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[9] The difficulties encountered by laymen attempting to report in summarized form the results of judicial proceedings are surely illustrated in the instant case. Respondent's husband in counterclaiming for divorce had alleged grounds of "extreme cruelty and adultery," a fact reported in the subsequent judicial opinion. That opinion went on to state:

"According to certain testimony in behalf of the defendant, extra marital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida in the case of Chesnut v. Chesnut, 33 So. 2d 730, where the court, in holding that a divorce rather than separate maintenance should be granted, said:

" 'The big trouble was total incapacity on the part of either for domestication. Seventy-five per cent of successful marriage depends on tact to cushion and bypass domestic frictions. It is much better than meeting them head on and bearing the scars they leave. When the bride and the groom are both devoid of a yen for domestication, the marital bark puts out to sea with its jib pointed to the rocks. . . . We think the record reveals a complete allergy to the give and take essential to successful marriage.'

. . . . .

"In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.

. . . . .

"The premises considered, it is thereupon

"ORDERED AND ADJUDGED as follows:

"1. That the equities in this cause are with the defendant; that defendant's counterclaim for divorce be and the same is hereby

"Some part of this is due to carelessness . . . . But a great deal of it must be attributed, in candor, to ignorance which frequently is not at all blameworthy. For newspapers are conducted by men who are laymen to the law. With too rare exceptions their capacity for misunderstanding the significance of legal events and procedures, not to speak of opinions, is great. But this is neither remarkable nor peculiar to newsmen. For the law, as lawyers best know, is full of perplexities.

"In view of these facts any standard which would require strict accuracy in reporting legal events factually or in commenting upon them in the press would be an impossible one. Unless the courts and judges are to be put above criticism, no such rule

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granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved." App. 523–529.

The Florida Supreme Court in the instant action found the fault required by *Gertz*, 418 U. S., at 347, to be present in the record by virtue of the fact that

"[p]ursuant to Florida law in effect at the time of the divorce judgment . . . a wife found guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty . . . ." 305 So. 2d 172, 178 (1974).

Surely the threat of press self-censorship in reporting judicial proceedings is obvious if liability is to be imposed on the basis of such "fault." Indeed, the impossibility of assuring against such errors in reporting is manifested by the fact that the same Florida Supreme Court, in reviewing the judgment of divorce some two and one-half years previous to the above-quoted statement, had found the divorce to have been granted by the trial judge on the erroneous grounds of "lack of domestication" rather than for either extreme cruelty or adultery. *Firestone* v. *Firestone*, 263 So. 2d 223 (1972).

> can obtain. There must be some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agencies in our democracy concerning courts as for all other instruments of government." *Pennekamp* v. *Florida*, 328 U. S. 331, 371–372 (1946) (Rutledge, J., concurring).[10]

For precisely such reasons, we have held that the contempt power may not be used to punish the reporting of judicial proceedings merely because a reporter "missed the essential point in a trial or failed to summarize the issues to accord with the views of the judge who sat on the case." *Craig* v. *Harney*, 331 U. S., at 375. See also *Pennekamp* v. *Florida*, *supra*. And "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *New York Times*, 376 U. S., at 277. The First Amendment insulates from defamation liability a margin for error sufficient to ensure the avoidance of crippling press self-censorship in the field of reporting public judicial affairs. To be adequate, that margin must be both of sufficient breadth and predictable in its application. In my view, therefore, the actual-malice standard of *New York Times* must be met in order to justify the imposition of liability in these circumstances.

MR. JUSTICE WHITE, dissenting.

I would affirm the judgment of the Florida Supreme Court because First Amendment values will not be furthered in any way by application to this case of the fault standards newly drafted and imposed by *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), upon which my

[10] Judge Frank's opinion of the phenomenon and its cause appears to have been roughly comparable. J. Frank, Courts On Trial 1–3 (Atheneum ed. 1963).

Brother REHNQUIST relies, or the fault standards required by *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), upon which my Brother BRENNAN relies; and because, in any event, any requisite fault was properly found below.

The jury found on ample evidence that the article published by petitioner Time, Inc., about respondent Firestone was false and defamatory. This Court has held, and no one seriously disputes, that, regardless of fault, "there is no constitutional value in false statements of fact." "They belong to that category of utterances which '. . . are of such slight social value as' " to be worthy of no First Amendment protection. *Gertz* v. *Robert Welch, Inc., supra,* at 340, quoting *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942). This Court's decisions from *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), through *Gertz* v. *Robert Welch, Inc., supra,* holding that the Constitution requires a finding of some degree of fault as a precondition to a defamation award, have done so for one reason and one reason alone: unless innocent falsehood is allowed as a defense, some true speech will also be deterred. Thus "[t]he First Amendment requires that we protect some falsehood *in order to protect speech that matters,*" *Gertz* v. *Robert Welch, Inc., supra,* at 341 (emphasis supplied), *e. g.*, true fact statements. In light of these decisions, the threshold question in the instant case should be whether requiring proof of fault on the part of Time, Inc., as a precondition to recovery in this case—and thereby possibly interfering with the State's desire to compensate respondent Firestone—will contribute in any way to the goal of protecting "speech that matters." I think it would not.

At the time of the defamatory publication in this case—December 1967—the law clearly authorized lia-

bility without fault in defamation cases of the sort involved here.* Whatever the chilling effect of that rule of law on publication of "speech that matters" in 1967 might have been, it has already occurred and is now irremediable. The goal of protecting "speech that matters" by announcing rules, as this Court did in *Gertz* v. *Robert Welch, Inc., supra,* and *Rosenbloom* v. *Metromedia, Inc., supra,* requiring fault as a precondition to a defamation recovery under circumstances such as are involved here, is *fully* achieved so long as fault is required for cases in which the publication occurred *after* the dates of those decisions. This is not such a case.

Therefore, to require proof of fault in this case—or in any other case predating *Gertz* and *Rosenbloom* in which a private figure is defamed—is to interfere with the State's otherwise legitimate policy of compensating defamation victims without furthering First Amendment goals *in any way at all.* In other areas in which the Court has developed a rule designed not to achieve justice in the case before it but designed to induce socially desirable conduct by some group in the future, the Court has declined to apply the rule to fact situations predating its announcement, *e. g., Williams* v.

**Konigsberg* v. *State Bar of California,* 366 U. S. 36, 49, and n. 10 (1961); *Times Film Corp.* v. *Chicago,* 365 U. S. 43, 48 (1961); *Roth* v. *United States,* 354 U. S. 476, 486–487 (1957); *Beauharnais* v. *Illinois,* 343 U. S. 250, 266 (1952); *Pennekamp* v. *Florida,* 328 U. S. 331, 348–349 (1946); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942); *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 715 (1931). The majority concludes that respondent Firestone was neither a "public official" nor a "public figure," *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964); *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967), and therefore that this case does not fall within any exception, then announced, to the Court's statements that common-law defamation rules do not violate the First Amendment. In this respect I agree with the majority.

United States, 401 U. S. 646, 653 (1971) (plurality opinion). The Court should follow a similar path here.

In any event, the judgment of the court below should be affirmed. My Brother REHNQUIST concludes that negligence is sufficient fault, under *Gertz,* to justify the judgment below, and that a finding of negligence may constitutionally be supplied by the Florida Supreme Court. I agree. Furthermore, the state court referred to *Gertz* v. *Robert Welch, Inc.,* by name; noted the "convincing evidence of . . . negligence" in the case; pointed out that a careful examination of the divorce decree would have "clearly demonstrated" that the divorce was not grounded on adultery, as reported by Time, Inc.; and stated flatly: "This is a flagrant example of 'journalistic negligence.'" 305 So. 2d 172, 178 (1974). It appears to me that the Florida Supreme Court has made a sufficiently "conscious determination," *ante,* at 463, of the fact of negligence. If it is *Gertz* that controls this case and if that decision is to be applied retroactively, I would affirm the judgment.

MR. JUSTICE MARSHALL, dissenting.

The Court agrees with the Supreme Court of Florida that the "actual malice" standard of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), does not apply to this case. Because I consider the respondent, Mary Alice Firestone, to be a "public figure" within the meaning of our prior decisions, *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323 (1974); *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967), I respectfully dissent.

I

Mary Alice Firestone was not a person "first brought to public attention by the defamation that is the subject of the lawsuit." *Rosenbloom* v. *Metromedia, Inc.,* 403 U. S. 29, 78, 86 (1971) (MARSHALL, J., dissenting). On the contrary, she was "prominent among the '400' of

Palm Beach society," and an "active [member] of the sporting set," 271 So. 2d 745, 751 (Fla. 1972), whose activities predictably attracted the attention of a sizable portion of the public. Indeed, Mrs. Firestone's appearances in the press were evidently frequent enough to warrant her subscribing to a press-clipping service.

Mrs. Firestone brought suit for separate maintenance, with reason to know of the likely public interest in the proceedings. As the Supreme Court of Florida noted, Mr. and Mrs. Firestone's "marital difficulties were . . . well-known," and the lawsuit became "a veritable *cause celebre* in social circles across the country." *Ibid.* The 17-month trial and related events attracted national news coverage, and elicited no fewer than 43 articles in the Miami Herald and 45 articles in the Palm Beach Post and Palm Beach Times. Far from shunning the publicity, Mrs. Firestone held several press conferences in the course of the proceedings.

These facts are sufficient to warrant the conclusion that Mary Alice Firestone was a "public figure" for purposes of reports on the judicial proceedings she initiated. In *Gertz* v. *Robert Welch, Inc., supra,* at 352, we noted that an individual can be a public figure for some purposes and a private figure for others. And we found two distinguishing features between public figures and private figures. First, we recognized that public figures have less need for judicial protection because of their greater ability to resort to self-help: "public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." 418 U. S., at 344.

As the above recital of the facts makes clear, Mrs. Firestone is hardly in a position to suggest that she lacked access to the media for purposes relating to her lawsuit.

It may well be that she would have had greater difficulty countering alleged falsehoods in the national press than in the Miami and Palm Beach papers that covered the proceedings so thoroughly. But presumably the audience Mrs. Firestone would have been most interested in reaching could have been reached through the local media. In any event, difficulty in reaching all those who may have read the alleged falsehood surely ought not preclude a finding that Mrs. Firestone was a public figure under *Gertz*. *Gertz* set no absolute requirement that an individual be able fully to counter falsehoods through self-help in order to be a public figure. We viewed the availability of the self-help remedy as a relative matter in *Gertz*, and set it forth as a minor consideration in determining whether an individual is a public figure.

The second, "more important," consideration in *Gertz* was a normative notion that public figures are less deserving of protection than private figures: That although "it may be possible for someone to become a public figure through no purposeful action of his own," generally those classed as public figures have "thrust themselves to the forefront of particular public controversies" and thereby "invite[d] attention and comment." *Id.*, at 344–345. And even if they have not, "the communications media are entitled to act on the assumption that . . . public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Id.*, at 345.

We must assume that it was by choice that Mrs. Firestone became an active member of the "sporting set"—a social group with "especial prominence in the affairs of society," *ibid.*, whose lives receive constant media attention. Certainly there is nothing in the record to indicate otherwise, and Mrs. Firestone's subscription to a press-clipping service suggests that she was not altogether unin-

terested in the publicity she received. Having placed herself in a position in which her activities were of interest to a significant segment of the public, Mrs. Firestone chose to initiate a lawsuit for separate maintenance, and most significantly, held several press conferences in the course of that lawsuit. If these actions for some reason fail to establish as a certainty that Mrs. Firestone "voluntarily exposed [herself] to increased risk of injury from defamatory falsehood," surely they are sufficient to entitle the press to act on the assumption that she did. Accordingly, Mrs. Firestone would appear to be a public figure under *Gertz*.

The Court resists this result by concluding that the subject matter of the alleged defamation was not a "public controversy" as that term was used in *Gertz*. In part, the Court's conclusion rests on what I view as an understatement of the degree to which Mrs. Firestone can be said to have voluntarily acted in a manner that invited public attention. But more fundamentally its conclusion rests on a reading of *Gertz* that differs from mine. The meaning that the Court attributes to the term "public controversy" used in *Gertz* resurrects the precise difficulties that I thought *Gertz* was designed to avoid.

It is not enough for the Court that, because of Mrs. Firestone's acquired prominence within a segment of society, her lawsuit had already attracted significant public attention and comment when the Time report was published. According to the Court, the controversy, already of interest to the public, was "not the sort of 'public controversy' referred to in *Gertz*." *Ante*, at 454. The only explanation I can discern from the Court's opinion is that the controversy was not of the sort deemed relevant to the "affairs of society," *ante*, at 453, and the public's interest not of the sort deemed "legitimate" or worthy of judicial recognition.

If there is one thing that is clear from *Gertz*, it is that we explicitly rejected the position of the plurality in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), that the applicability of the *New York Times* standard depends upon whether the subject matter of a report is a matter of "public or general concern." We explained in *Gertz* that the test advanced by the *Rosenbloom* plurality

> "would occasion the . . . difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not—to determine, in the words of MR. JUSTICE MARSHALL, 'what information is relevant to self-government.' *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S., at 79. We doubt the wisdom of committing this task to the conscience of judges." 418 U. S., at 346.

Having thus rejected the appropriateness of judicial inquiry into "the legitimacy of interest in a particular event or subject," *Rosenbloom, supra,* at 78, 79 (MARSHALL, J., dissenting), *Gertz* obviously did not intend to sanction any such inquiry by its use of the term "public controversy." Yet that is precisely how I understand the Court's opinion to interpret *Gertz*.[1]

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[1] The Supreme Court of Florida's explanation of why the *New York Times* standard is inapplicable is equally inconsistent with *Gertz*. After referring to Mrs. Firestone's prominence in Palm Beach society, the widespread attention her lawsuit received, and her granting of interviews to the news media, the court reasoned as follows:

"That the public was curious, titillated or intrigued with the scandal in the Firestone divorce is beyond doubt. But we again emphasize the distinction we make between that genre of public interest and real public or general *concern*.

. . . .

". . . [W]e cannot find here any aspect of real public concern,

If *Gertz* is to have any meaning at all, the focus of analysis must be on the actions of the individual, and the degree of public attention that had already developed, or that could have been anticipated, before the report in question. Under this approach, the class of public figures must include an individual like Mrs. Firestone, who acquired a social prominence that could be expected to attract public attention, initiated a lawsuit that predictably attracted more public attention, and held press conferences in the course of and in regard to the lawsuit.[2] I would hold that, for purposes of this

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and none has been shown to us, which would be furthered or enhanced by 'free discussion' and 'robust debate' about the divorce of Russell and Mary Alice Firestone.

"Nor did [Mrs. Firestone's] quoted interviews with the press raise the untidy affair to the dignity of true public concern. Unlike an actress who might grant interviews relating to the opening of her new play, [Mrs. Firestone] was not seeking public patronage. Publicity, or sympathy, perhaps, but not patronage. Irrespective of her subjective motives, objectively she was merely satiating the appetites of a curious press.

"In sum, the Firestone divorce action was unquestionably newsworthy, but reports thereof were not constitutionally protected as being matters of real public or general concern." 271 So. 2d, at 752.

This language is from an opinion that issued before *Gertz* was decided, but the reasoning was reaffirmed in the Supreme Court of Florida's final opinion in the case, 305 So. 2d 172, 174–175 (1974), which issued after our decision in *Gertz*.

[2] The Court places heavy emphasis on the degree to which Mrs. Firestone attempted to "influence the resolution of" a particular controversy. In response to the observation that Mrs. Firestone held press conferences, for example, the Court notes that those conferences were not intended to influence the outcome of the trial or any other controversy. *Ante*, at 454–455, n. 3. *Gertz* did, of course, refer to the fact that persons often become public figures by attempting to influence the resolution of public questions. 418 U. S., at 345. But the reference must be viewed as but an example of how one becomes a public figure. Surely *Gertz* did not intend

case, Mrs. Firestone is a public figure, who must demonstate that the report in question was published with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

II

While the foregoing discussion is sufficient to dispose of the case under my reading of the law, two other aspects of the Court's opinion warrant comment. First, the Court appears to reject the contention that a rational interpretation of an ambiguous document is always entitled to some constitutional protection. The Court reads *Time, Inc.* v. *Pape*, 401 U. S. 279 (1971), as providing such protection only under the rubric of the *New York Times* "actual malice" standard. *Ante*, at 459 n. 4. I disagree. While the precise holding in *Pape* was that the choice of one of several rational interpretations of an ambiguous document is not enough to create a jury issue of "actual malice," the Court's reasoning suggests that its holding ought not be so confined. In introducing its discussion, the Court noted:

> "[A] vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*. Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like. The question of the 'truth' of

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to establish a requirement that an individual attempt to influence the resolution of a particular controversy before he can be termed a public figure. If that were the rule, Athletic Director Butts in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), would not be a public figure. We held that Butts was a public figure, and in *Gertz* we specifically noted that that decision was "correct." 418 U. S., at 343.

> such an indirect newspaper report presents rather complicated problems." 401 U. S., at 285–286 (emphasis in original).

And in discussing the need for some protection for the publisher attempting to report the gist of a lengthy government document, the Court observed:

> "Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of 'truth' that would not put the publisher virtually at the mercy of the unguided discretion of a jury." *Id.*, at 291.

Surely the Court's evident concern that publishers be accorded the leeway to offer rational interpretations of ambiguous documents was not restricted to cases in which the *New York Times* standard is applicable. That concern requires that protection for rational interpretations be accorded under the fault standard contemplated in *Gertz*. Thus my Brothers POWELL and STEWART, while joining the opinion of the Court, recognize that the rationality of an interpretation of an ambiguous document must figure as a crucial element in any assessment of fault under *Gertz*. *Ante*, at 467–469. I agree. The choice of one of several rational interpretations of an ambiguous document, without more, is insufficient to support a finding of fault under *Gertz*.

Finally, assuming that the Court is correct in its assessment of the law in this case, I find the Court's disposition baffling. The Court quotes that portion of the Florida Supreme Court's opinion which, citing *Gertz*, states in no uncertain terms that Time's report was a "flagrant example of 'journalistic negligence.'" 305 So. 2d 172, 178 (1974). But the Court is unwilling to read that statement as a "conscious determination" of fault, and accordingly the Court remands the case for an assessment of fault.

Surely the Court cannot be suggesting that the quoted portion of the Supreme Court of Florida's opinion, which contained a citation to *Gertz*, had no meaning at all. And if it did have meaning, it must have reflected either an intention to find fault or an intention to affirm a finding of fault. It is quite clear that the opinion was not intended to affirm any finding of fault, for as the Court observes there was no finding of fault to affirm. The question of fault had not been submitted to the jury, and the District Court of Appeal had explicitly noted the absence of any proof that Time had been negligent. 254 So. 2d 386, 390 (1971). The absence of any prior finding of fault only reinforces what the Florida Supreme Court's language itself makes clear—that the court was not simply affirming a finding of fault, but making such a finding in the first instance.

I therefore agree with my Brother WHITE that the Supreme Court of Florida made a conscious determination of fault. I would add, however, that it is a determination that is wholly unsupportable. The sole basis for that court's determination of fault was that under Florida law a wife found guilty of adultery cannot be, as Mrs. Firestone was, awarded alimony. Time, the court reasoned, should have realized that a divorce decree containing an award of alimony could not, consistent with Florida law, have been based on adultery. But that reasoning assumes that judicial decisions can always be squared with the prior state of the law. If we need be reminded that courts occasionally err in their assessment of the law, we need only refer to the subsequent history of the divorce decree involved in this case: When the divorce case reached the Supreme Court of Florida, that court found that the divorce had been granted for lack of "domestication" and pointed out that that was not one of the statutory grounds for

divorce. *Firestone* v. *Firestone*, 263 So. 2d 223 (1972). Time's responsibility was to report accurately what the trial court did, not what it could or should have done. If the trial court awarded alimony while basing the divorce on a finding of adultery by the wife, Time cannot be faulted for reporting that fact. Unless there is some basis for a finding of fault other than that given by the Supreme Court of Florida, I think it clear that there can be no liability.

FEDERAL POWER COMMISSION *v.* MOSS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-883. Argued December 3, 1975—Decided March 3, 1976

The Federal Power Commission (FPC), for the purpose of "stimulat[ing] and accelerat[ing] domestic exploration and development of natural gas reserves," by order established an "optional procedure for certificating new producer sales of natural gas." Under the order producers may tender for FPC approval contracts for the sale of new natural gas at rates exceeding the maximum authorized by the applicable rate order; the FPC will determine in a single proceeding whether the "public convenience and necessity" under § 7 (c) of the Natural Gas Act (Act) warrants the issuance of a certificate authorizing the sale and whether the contract rates are "just and reasonable" under § 4 (a); and a permanent certificate issued by the FPC and accepted by the producer is not subject to change in later proceedings under § 4, and the rates may be collected without risk of refund obligations. At the time it issues the certificate the FPC may also authorize the producer to abandon the sale at the end of the contract term if such abandonment is warranted by the "public convenience or necessity" under § 7 (b), and the producer when the contract expires is then free to discontinue deliveries to the original purchaser without having to demonstrate again that abandonment comports with the public convenience or necessity. Petitions for review were filed attacking the entire optional procedure, but the Court of Appeals upheld the order except for the pregranted abandonment authority, which the court held contravened § 7 (b) of the Act. Under that provision no natural gas company shall abandon its facilities or service subject to the FPC's jurisdiction without FPC approval, based upon a finding by the FPC that "the present or future public convenience or necessity permit such abandonment." *Held:* An optional procedure encompassing pregranted abandonment authority intended to draw new gas supplies to the interstate market is clearly within the FPC's authority under § 7 (b) to permit abandonments justified by *present* or *future* public convenience or necessity, the timing of the abandonment approval being within the FPC's discretion.

The order, which does not authorize specific abandonments, merely establishes an optional procedure under which pregranted abandonments, subject to judicial review, may be granted in appropriate cases, and the question whether particular abandonment authorizations are beyond the FPC's expertise should await resolution in concrete cases. In both the case of the limited-time certificate (which the Court of Appeals by an erroneous construction of *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137, thought was barred by the Act) and the case of the permanent certificate with pregranted abandonment, the FPC properly can determine at the time of certification that the present or future public convenience or necessity justifies the issuance of the certificate allowing discontinuance of service at a future date without need for further proceedings. Pp. 499–504.

164 U. S. App. D. C. 1, 502 F. 2d 461, reversed in part and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 505. STEWART, POWELL, and STEVENS, JJ., took no part in the consideration or decision of the case.

Mark L. Evans argued the cause for petitioner. With him on the brief were *Solicitor General Bork, Drexel D. Journey, Robert W. Perdue,* and *Allan Abbot Tuttle.*

Morton L. Simons argued the cause for respondents. With him on the brief were *Barbara M. Simons, Charles F. Wheatley, Jr., William T. Miller, Frank W. Frisk, Jr., Richard L. Curry,* and *Bernard Rane.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 7 (b) of the Natural Gas Act, 52 Stat. 824, as amended, 15 U. S. C. § 717f (b), provides that "[n]o natural-gas company shall abandon all

**Jerome J. McGrath* filed a brief for the Interstate Natural Gas Association of America as *amicus curiae.*

or any portion of its facilities subject to the jurisdiction of the [Federal Power] Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission . . . that the present or future public convenience or necessity permit such abandonment." [1] The question presented in this case is whether the FPC may, upon a proper finding of public convenience or necessity, simultaneously authorize both the sale of natural gas in interstate commerce by a producer and the abandonment of the sale at a future date certain. The Court of Appeals for the District of Columbia Circuit construed § 7 (b) to empower the FPC to authorize abandonment only when and if proposed at the end of the contract term, thus precluding power to authorize abandonment simultaneously with certificating new producer sales. Accordingly, the Court of Appeals set aside the FPC order involved in this case insofar as it permits the Commission, at the time it issues a certificate of public convenience and necessity, to authorize the producer to terminate the sale at the end of the contract term. 164 U. S. App. D. C. 1, 502 F. 2d 461 (1974). We granted certiorari. 422 U. S. 1006 (1975). We reverse.

I

FPC Order No. 455, 48 F. P. C. 218, issued August 3, 1972, is the order involved. The order was promulgated

[1] Section 7 (b) of the Act provides in full text:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

under FPC rulemaking authority pursuant to a notice of April 6, 1972, 37 Fed. Reg. 7345, as an addition to the FPC's general rules of practice and procedure, 18 CFR § 2.75 (1975). Order No. 455 established an "optional procedure for certificating new producer sales of natural gas." 48 F. P. C., at 218. The new procedure did not displace area pricing, but instead provided an alternative to "stimulate and accelerate domestic exploration and development of natural gas reserves." *Id.*, at 225. The procedure was necessary, the Commission found, because natural gas producers were frequently unable, due to hazards of area price revisions in lengthy appellate review proceedings, to rely upon rates established by the FPC in its area rate orders, and thus were discouraged from exploring for new gas and committing it to the interstate market. For "there is no assurance at the present time that a producer may not ultimately have to refund some of an initial rate . . . upon which the producer relied when it dedicated a new gas supply to the interstate market." *Id.*, at 222–223. "[T]he producer does not know . . . how much it will get if it develops and sells new gas to the interstate market. The producer knows for sure only that once it sells in interstate commerce it cannot stop deliveries." *Id.*, at 223. "This uncertainty," the Commission found, "has impeded domestic exploration and development." *Ibid.*

The optional procedure introduced by Order No. 455 was designed to "lessen rate uncertainty which has prevailed since the early 1960's." *Id.*, at 219. The procedure has several features. First, it permits producers to tender for FPC approval contracts for the sale of new natural gas [2] at rates that may exceed the maximum

[2] The optional procedure is available for sales of gas produced from wells commenced after April 6, 1972, and gas that has not previously been sold in the interstate market. 18 CFR § 2.75 (b) (5) (1975).

authorized by the applicable rate order.[3] Second, the FPC will determine in a single proceeding whether the "public convenience and necessity" under § 7 (c) of the Act, 15 U. S. C. § 717f (c), warrants the issuance of a certificate authorizing the sale and whether the rates called for by the contract are "just and reasonable" under § 4 (a), 15 U. S. C. § 717c (a). Third, a permanent certificate issued by the Commission and accepted by the producer is not subject to change in later proceedings under § 4 of the Act,[4] 15 U. S. C. § 717c, and the rates may be collected without risk of refund obligations. 48 F. P. C., at 226. See 18 CFR § 2.75 (d) (1975). Fourth, Order No. 455 authorizes inclusion in the permanent certificate of the abandonment assurance—or "pregranted abandonment"—called in question in this case. 18 CFR § 2.75 (e) (1975).[5] The authority to include assurance that the producer may abandon the sale at the end of the contract term is, however, to be exercised only upon ap-

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[3] After adoption of the optional procedure, the FPC established a national ceiling rate for some sales of natural gas. Opinion No. 699, 51 F. P. C. 2212 (1974). The optional procedure was then amended to permit producers to tender contracts for certification including rates exceeding the national ceiling, as well as area rates. Order No. 455–B, 52 F. P. C. 1416 (1974).

[4] The procedure does not, however, limit the applicability of § 5, 15 U. S. C. § 717d. See 18 CFR § 2.75 (d) (1975). The Commission noted in Order No. 455 that it was unable to "bind a future Commission not to invoke the prospective operation of Section 5"; the Commissioners further stated that "[t]o the extent that this Commission can grant certainty of rates, we do so." 48 F. P. C. 218, 223 (1972).

[5] This provision reads as follows:

"Applications presented hereunder will be considered for permanent certification, either with or without pregranted abandonment, notwithstanding that the contract rate may be in excess of an area ceiling rate established in a prior opinion or order of this Commission."

propriate findings by the FPC of public convenience or necessity, as required by § 7 (b). Order No. 455–A, 48 F. P. C. 477, 481 (1972).

The importance to the producer of the pregranted abandonment provision is obvious. Pregranted abandonment gives the producer assurance that his present sale will not indefinitely commit the gas to what may be a lower priced interstate market: he will be free on the contract expiration date to discontinue deliveries to the purchaser without having to demonstrate again that abandonment is consistent with the public convenience or necessity.

II

The entire optional procedure of Order No. 455 was attacked in petitions for review before the Court of Appeals, which upheld the order in all respects save the pregranted abandonment authority.[6] In holding that § 7 (b) requires a public-convenience-or-necessity finding by the FPC at the time of the proposed abandonment, thus precluding such finding at the time of certification, the Court of Appeals stated, 164 U. S. App. D. C., at 12, 502 F. 2d, at 472:

> "Pregranted abandonment would leave a producer free to discontinue service to the interstate market, perhaps years after the original certification, with no contemporaneous obligation on the producer to justify withdrawal of service as consistent with the public convenience and necessity. We think Section 7 (b) does not contemplate or authorize such procedure.
>
> ". . . It appears to us . . . that pregranted abandon-

[6] Respondents' cross-petition seeking review of the Court of Appeals' decision to the extent that it adversely resolved their contentions was denied. 422 U. S. 1020 (1975).

> ment requires more clairvoyance than even the Commission's expertise reasonably encompasses."

We find nothing on the face of § 7 (b) to support the holding that the section "does not contemplate or authorize such procedure." There is no express provision prescribing the timing of the finding of public convenience or necessity that is prerequisite to FPC authority to allow the producer to abandon a sale. In the absence of an explicit direction, the inference may reasonably be made that Congress left the timing of the finding within the general discretionary power granted the FPC "to regulate the abandonment of service," S. Rep. No. 1162, 75th Cong., 1st Sess., 2 (1937); H. R. Rep. No. 709, 75th Cong., 1st Sess., 2 (1937). "[T]he Commission's broad responsibilities . . . demand a generous construction of its statutory authority," *Permian Basin Area Rate Cases,* 390 U. S. 747, 776 (1968) (footnote omitted), and that inference is plainly consistent with Congress' regulatory goals.

The reasoning of the Court of Appeals that pregranted abandonment requires "clairvoyance" overlooks the express power granted to the FPC in § 7 (b) to allow abandonment upon a proper finding that the *"present* or *future"* public convenience or necessity warrants permission to abandon. The power to authorize an abandonment upon finding that it is justified by *future* public convenience or necessity clearly encompasses advance authorization warranted by consideration of future circumstances and the necessary estimation of tomorrow's needs. That has been our conclusion when FPC authority to make forecasts of future events has been challenged in other contexts. For example, in rejecting the contention that the FPC could not consider forecasts of the future under the nearly identical standard of § 7 (e), *FPC* v. *Transcontinental Gas Corp.,* 365 U. S. 1, 29 (1961), stated that "a forecast of the direction in which future pub-

lic interest lies necessarily involves deductions based on the expert knowledge of the agency." Similarly, as to another agency, we have stated our unwillingness to let "uncertainties as to the future . . . paralyze the [Interstate Commerce] Commission into inaction." *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U. S. 236, 241 (1945). Thus, to the extent that exercising the pregranted abandonment authority entails forecasting future developments affecting supply and demand, we cannot say that requiring this degree of "clairvoyance" renders the provision beyond FPC authority.

Furthermore, the FPC may determine that *present* supply and demand conditions require that pregranted abandonment be authorized in appropriate cases to encourage exploration for new gas and its dedication to the interstate market, since the unwillingness of producers to make indefinite commitments has made potentially available supplies inaccessible to the interstate market. We conclude therefore that an optional procedure encompassing pregranted authority intended to draw new gas supplies to the interstate market is clearly within FPC authority to permit abandonments justified by either *present* or *future* public convenience or necessity.[7]

Order No. 455 does not authorize specific abandonments. It merely establishes an optional procedure under which pregranted abandonment may be authorized in appropriate cases. Any pregranted abandonments approved under this procedure are subject to judicial review under the Act. See § 19 (b), 15 U. S. C. § 717r (b). We should not presume, as the Court of Appeals

[7] The FPC has disclaimed any reliance on the ground, permitted under § 7 (b), that "the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted." We therefore have no occasion to address the question whether pregranted abandonment on that ground would exceed FPC authority.

did, that the Commission is not competent to make proper findings supported by substantial evidence and consistent with § 7 (b) in approving pregranted abandonment. Rather, the question whether particular pregranted abandonment authorizations are beyond the Commission's expertise should await resolution in concrete cases. See *FPC* v. *Texaco, Inc.*, 417 U. S. 380, 392 (1974).[8] It suffices for the purposes of this case that we read § 7 (b) as leaving the timing of approval of abandonments to FPC discretion.[9]

III

The Court of Appeals stated that its construction of § 7 (b) as denying FPC authority to authorize abandon-

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[8] Paradoxically, similar considerations led the Court of Appeals to reject respondents' challenge to a provision of the optional procedure requiring the Commission to determine the reasonableness of future rate escalations included in contracts submitted pursuant to the procedure. Yet no attempt was made to distinguish the case of future rate escalations from that of pregranted abandonment in this respect. The Court said:

"We cannot say as an abstract proposition of law that it is impossible for the Commission to make an advance determination of 'reasonableness' in proceedings under Section 4. Although as a practical matter one may be skeptical about the ability of the Commission to succeed in this endeavor, we think it may make the attempt. Whether it succeeds will depend upon the evidentiary basis for the escalations proposed in a given contract and the reasonableness of Commission findings and projections supporting and approving such escalations. The question is one of proof which can be answered only on a record setting out a particular proposal and the evidence supporting it." 164 U. S. App. D. C., at 8, 502 F. 2d, at 468.

[9] Respondents claim that the pregranted abandonment provision amounts to deregulation akin to that condemned in *FPC* v. *Texaco, Inc.*, 417 U. S. 380, 400 (1974). But, unlike the small-producer exemption involved there, the FPC in the optional procedure retains full control over its regulatory jurisdiction.

ment on a future date certain at the time of certification was "fortified" by *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137 (1960) (*Sunray II*). *Sunray II* held that the FPC had authority to tender a certificate of public convenience and necessity without time limitation to a producer who applied for a certificate authorizing sales for 20 years only. The Court reasoned, *id.*, at 142:

> "If petitioners' contentions, as to the want of authority in the Commission to grant a permanent certificate where one of limited duration has been sought for, were to be sustained, the way would be clear for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and thus automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market."

We understand the Court of Appeals to read this passage as implying that a limited-term certificate would be barred by the Act, and that a permanent certificate with pregranted abandonment would also be barred since such a certificate, as the FPC concedes, Brief for FPC 22, is legally and functionally indistinguishable from a limited-term certificate.[10] But the Court of Appeals' reading of *Sunray II* was patently erroneous. *Sunray II* in

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[10] The Court of Appeals found that pregranted abandonment has "the same potentiality of prejudice to consumers" that this Court was concerned about in *Sunray II*. 164 U. S. App. D. C., at 12, 502 F. 2d, at 472. In that case, however, Sunray's position would have removed FPC discretion not to issue limited-term certificates whenever a producer sought a limited certificate. Both *Sunray II* and today's decision maintain FPC discretion in this regard, while the Court of Appeals' conclusion reduces the FPC's ability to exercise its regulatory responsibility.

fact indicated that the FPC is authorized to issue limited-term certificates. The Court of Appeals for the Tenth Circuit had addressed that question at an earlier stage of the litigation and had held that the FPC was authorized to issue such certificates. *Sunray Mid-Continent Oil Co.* v. *FPC*, 239 F. 2d 97 (1956), rev'd on other grounds, 353 U. S. 944 (1957) (*Sunray I*).[11] *Sunray II* implicitly approved this holding in stating, 364 U. S., at 157: "There is no contention that the Commission was again indulging in the erroneous notion that it had no power to issue a limited certificate."

Thus, rather than imply that the Act forbids the issuance of a limited-term certificate, *Sunray II* approved the holding of the Court of Appeals for the Tenth Circuit that the Act permits the issuance of such a certificate.[12] *Sunray II* therefore supports the conclusion we have reached and does not fortify the Court of Appeals' construction of § 7 (b). In both the case of the limited-term certificate and the case of the permanent certificate with pregranted abandonment, the FPC determines at the time of certification that the present or future public convenience or necessity justifies the issuance of a certificate that allows discontinuance of service at a future date certain without need for further proceedings.

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[11] The first decision of the Court of Appeals for the Tenth Circuit was reversed in *Sunray I* on the ground that the Court had itself decided whether the FPC should have issued a limited-term certificate, rather than remanding to the Commission to resolve this question in the first instance, 353 U. S. 944. *Sunray II* sustained the Court of Appeals' later affirmance of the FPC's issuance of an unlimited certificate, 267 F. 2d 471 (1959).

[12] Moreover, if issuance of limited-term certificates were barred by the Act, there would have been no need to decide *Sunray II*. In that circumstance the producer could hardly have complained that the FPC failed to recognize its request for only a limited certificate, since such a reading of the Act requires the FPC in all cases to issue unlimited-term certificates.

The judgment of the Court of Appeals is reversed insofar as it set aside the pregranted abandonment provision of Order No. 455, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment of the Court, but with respect I cannot agree that the holding in *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137 (1960) (*Sunray II*), is as categorical as the Court suggests. I therefore do not agree that the Court of Appeals' reading of *Sunray II* is "patently erroneous." *Ante*, at 503.

The optional procedure established by Order No. 455 does not appear to be precisely the same as a limited-term certificate. Under the new procedure, the Commission issues a *permanent* certificate to the producer. The producer is therefore authorized to supply the interstate market indefinitely. The additional and novel feature is that the producer is apparently given a free choice at the end of the contract term; he can continue to supply the interstate market pursuant to his permanent certificate, or he can abandon any further sales at the end of the particular contract term. This decision is left entirely in the hands of the producer. The Commission has no voice whatever in this critical decision; and it does not know in advance what the producer will do. This seems to me far different from granting a limited-term certificate; in that instance, the FPC knows that the particular supplies of gas will end at a date certain,

unless both the producer *and* the Commission decide that the supply should continue.

This factor of unregulated choice by the producer raises the very evils which the Court pointed out in *Sunray II*, *supra:*

> "[E]very independent producer of natural gas . . . [would] be free at a future date, untrammeled by Commission regulation, *to reassess whether it desired to continue serving the interstate market.*" 364 U. S., at 142.

The evil seems even more acute here. For the Commission has abdicated entirely to the producer the eventual choice of supplying or cutting off gas to interstate markets. This relinquishment of regulatory authority seems to me inconsistent with the purposes and design of the Natural Gas Act.

However, the Court accepts *Sunray II* as affording broad discretion to the Commission in such matters, and *stare decisis* compels me to accept the result.

Syllabus

HUDGENS *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74-773. Argued October 14, 1975—Decided March 3, 1976

When striking members of respondent union picketed in front of their employer's leased store located in petitioner's shopping center, the shopping center's general manager threatened them with arrest for criminal trespass if they did not depart, and they left. The union then filed unfair labor practice charges against petitioner, alleging that the threat constituted interference with rights protected by § 7 of the National Labor Relations Act (NLRA). The National Labor Relations Board (NLRB), concluding that the NLRA had been violated, issued a cease-and-desist order against petitioner, and the Court of Appeals enforced the order. Petitioner and respondent union contend that the respective rights and liabilities of the parties are to be decided under the criteria of the NLRA alone, whereas the NLRB contends that such rights and liabilities must be measured under a First Amendment standard. *Held:*

1. Under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this, and the pickets here did not have a First Amendment right to enter the shopping center for the purpose of advertising their strike against their employer. *Lloyd Corp.* v. *Tanner,* 407 U. S. 551. Pp. 512-521.

2. The rights and liabilities of the parties are dependent exclusively upon the NLRA, under which it is the NLRB's task, subject to judicial review, to resolve conflicts between § 7 rights and private property rights and to seek accommodation of such rights "with as little destruction of one as is consistent with the maintenance of the other," *NLRB* v. *Babcock & Wilcox Co.,* 351 U. S. 105, 112. Hence, the case is remanded so that the NLRB may reconsider the case under the NLRA's statutory criteria alone. Pp. 521-523.

501 F. 2d 161, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined.

POWELL, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 523. WHITE, J., filed an opinion concurring in the result, *post*, p. 524. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 525. STEVENS, J., took no part in the consideration or decision of the case.

Lawrence M. Cohen argued the cause for petitioner. With him on the brief were *Steven R. Semler* and *Dow N. Kirkpatrick, II.*

Norton J. Come argued the cause for respondent National Labor Relations Board. With him on the brief were *Solicitor General Bork, William L. Patton, Peter G. Nash, John S. Irving, Patrick Hardin,* and *Robert A. Giannasi. Laurence Gold* argued the cause for respondent Local 315, Retail & Wholesale Department Store Union, AFL–CIO. With him on the brief were *Morgan Stanford* and *J. Albert Woll.**

MR. JUSTICE STEWART delivered the opinion of the Court.

A group of labor union members who engaged in peaceful primary picketing within the confines of a privately owned shopping center were threatened by an agent of the owner with arrest for criminal trespass if they did not depart. The question presented is whether this threat violated the National Labor Relations Act, 49 Stat. 449, as amended, 61 Stat. 136, 29 U. S. C. § 151 *et seq.* The National Labor Relations Board concluded that it did, 205 N. L. R. B. 628, and the Court of Appeals for the Fifth Circuit agreed. 501 F. 2d 161. We granted certiorari because of the seemingly important questions of federal law presented. 420 U. S. 971.

**Milton A. Smith, Richard B. Berman, Gerard C. Smetana,* and *Jerry Kronenberg* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

I

The petitioner, Scott Hudgens, is the owner of the North DeKalb Shopping Center, located in suburban Atlanta, Ga. The center consists of a single large building with an enclosed mall. Surrounding the building is a parking area which can accommodate 2,640 automobiles. The shopping center houses 60 retail stores leased to various businesses. One of the lessees is the Butler Shoe Co. Most of the stores, including Butler's, can be entered only from the interior mall.

In January 1971, warehouse employees of the Butler Shoe Co. went on strike to protest the company's failure to agree to demands made by their union in contract negotiations.[1] The strikers decided to picket not only Butler's warehouse but its nine retail stores in the Atlanta area as well, including the store in the North DeKalb Shopping Center. On January 22, 1971, four of the striking warehouse employees entered the center's enclosed mall carrying placards which read: "Butler Shoe Warehouse on Strike, AFL–CIO, Local 315." The general manager of the shopping center informed the employees that they could not picket within the mall or on the parking lot and threatened them with arrest if they did not leave. The employees departed but returned a short time later and began picketing in an area of the mall immediately adjacent to the entrances of the Butler store. After the picketing had continued for approximately 30 minutes, the shopping center manager again informed the pickets that if they did not leave they would be arrested for trespassing. The pickets departed.

The union subsequently filed with the Board an unfair labor practice charge against Hudgens, alleging interference with rights protected by § 7 of the Act, 29

[1] The Butler warehouse was not located within the North DeKalb Shopping Center.

U. S. C. § 157.[2] Relying on this Court's decision in *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308, the Board entered a cease-and-desist order against Hudgens, reasoning that because the warehouse employees enjoyed a First Amendment right to picket on the shopping center property, the owner's threat of arrest violated § 8 (a)(1) of the Act, 29 U. S. C. § 158 (a)(1).[3] Hudgens filed a petition for review in the Court of Appeals for the Fifth Circuit. Soon thereafter this Court decided *Lloyd Corp.* v. *Tanner*, 407 U. S. 551, and *Central Hardware Co.* v. *NLRB*, 407 U. S. 539, and the Court of Appeals remanded the case to the Board for reconsideration in light of those two decisions.

The Board, in turn, remanded to an Administrative Law Judge, who made findings of fact, recommendations, and conclusions to the effect that Hudgens had committed an unfair labor practice by excluding the pickets.

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[2] Section 7, 29 U. S. C. § 157, provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title."

[3] *Hudgens* v. *Local 315, Retail, Wholesale & Dept. Store Union*, 192 N. L. R. B. 671. Section 8 (a)(1) makes it an unfair labor practice for "an employer" to "restrain, or coerce employees" in the exercise of their § 7 rights. While Hudgens was not the employer of the employees involved in this case, it seems to be undisputed that he was an employer engaged in commerce within the meaning of §§ 2 (6) and (7) of the Act, 29 U. S. C. §§ 152 (6) and (7). The Board has held that a statutory "employer" may violate § 8 (a)(1) with respect to employees other than his own. See *Austin Co.*, 101 N. L. R. B. 1257, 1258–1259. See also § 2 (13) of the Act, 29 U. S. C. § 152 (13).

This result was ostensibly reached under the statutory criteria set forth in *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, a case which held that union organizers who seek to solicit for union membership may intrude on an employer's private property if no alternative means exist for communicating with the employees. But the Administrative Law Judge's opinion also relied on this Court's constitutional decision in *Logan Valley* for a "realistic view of the facts." The Board agreed with the findings and recommendations of the Administrative Law Judge, but departed somewhat from his reasoning. It concluded that the pickets were within the scope of Hudgens' invitation to members of the public to do business at the shopping center, and that it was, therefore, immaterial whether or not there existed an alternative means of communicating with the customers and employees of the Butler store.[4]

Hudgens again petitioned for review in the Court of Appeals for the Fifth Circuit, and there the Board changed its tack and urged that the case was controlled not by *Babcock & Wilcox*, but by *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793, a case which held that an employer commits an unfair labor practice if he enforces a no-solicitation rule against employees on his premises who are also union organizers, unless he can prove that the rule is necessitated by special circumstances. The Court of Appeals enforced the Board's cease-and-desist order but on the basis of yet another theory. While acknowledging that the source of the pickets' rights was § 7 of the Act, the Court of Appeals held that the competing constitutional and property right considerations discussed in *Lloyd Corp.* v. *Tanner*, *supra*, "burde[n] the General Counsel with the duty to

[4] *Hudgens* v. *Local 315, Retail, Wholesale & Dept. Store Union*, 205 N. L. R. B. 628.

prove that other locations less intrusive upon Hudgens' property rights than picketing inside the mall were either unavailable or ineffective," 501 F. 2d, at 169, and that the Board's General Counsel had met that burden in this case.

In this Court the petitioner Hudgens continues to urge that *Babcock & Wilcox Co.* is the controlling precedent, and that under the criteria of that case the judgment of the Court of Appeals should be reversed. The respondent union agrees that a statutory standard governs, but insists that, since the § 7 activity here was not organizational as in *Babcock* but picketing in support of a lawful economic strike, an appropriate accommodation of the competing interests must lead to an affirmance of the Court of Appeals' judgment. The respondent Board now contends that the conflict between employee picketing rights and employer property rights in a case like this must be measured in accord with the commands of the First Amendment, pursuant to the Board's asserted understanding of *Lloyd Corp.* v. *Tanner, supra,* and that the judgment of the Court of Appeals should be affirmed on the basis of that standard.

II

As the above recital discloses, the history of this litigation has been a history of shifting positions on the part of the litigants, the Board, and the Court of Appeals. It has been a history, in short, of considerable confusion, engendered at least in part by decisions of this Court that intervened during the course of the litigation. In the present posture of the case the most basic question is whether the respective rights and liabilities of the parties are to be decided under the criteria of the National Labor Relations Act alone, under a First Amendment standard, or under some combination of the two. It is to that question, accordingly, that we now turn.

It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. See *Columbia Broadcasting System, Inc.* v. *Democratic National Comm.*, 412 U. S. 94. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.

This elementary proposition is little more than a truism. But even truisms are not always unexceptionably true, and an exception to this one was recognized almost 30 years ago in *Marsh* v. *Alabama*, 326 U. S. 501. In *Marsh*, a Jehovah's Witness who had distributed literature without a license on a sidewalk in Chickasaw, Ala., was convicted of criminal trespass. Chickasaw was a so-called company town, wholly owned by the Gulf Shipbuilding Corp. It was described in the Court's opinion as follows:

> "Except for [ownership by a private corporation] it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly

> settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." *Id.*, at 502–503.

The Court pointed out that if the "title" to Chickasaw had "belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company town it would have been clear that appellant's conviction must be reversed." *Id.*, at 504. Concluding that Gulf's "property interests" should not be allowed to lead to a different result in Chickasaw, which did "not function differently from any other town," *id.*, at 506–508, the Court invoked the First and Fourteenth Amendments to reverse the appellant's conviction.

It was the *Marsh* case that in 1968 provided the foundation for the Court's decision in *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308. That case involved peaceful picketing within a large

shopping center near Altoona, Pa. One of the tenants of the shopping center was a retail store that employed a wholly nonunion staff. Members of a local union picketed the store, carrying signs proclaiming that it was nonunion and that its employees were not receiving union wages or other union benefits. The picketing took place on the shopping center's property in the immediate vicinity of the store. A Pennsylvania court issued an injunction that required all picketing to be confined to public areas outside the shopping center, and the Supreme Court of Pennsylvania affirmed the issuance of this injunction. This Court held that the doctrine of the *Marsh* case required reversal of that judgment.

The Court's opinion pointed out that the First and Fourteenth Amendments would clearly have protected the picketing if it had taken place on a public sidewalk:

> "It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality. *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Hague* v. *CIO,* 307 U. S. 496 (1939); *Schneider* v. *State,* 308 U. S. 147 (1939); *Jamison* v. *Texas,* 318 U. S. 413 (1943). The essence of those opinions is that streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." 391 U. S., at 315.

The Court's opinion then reviewed the *Marsh* case in detail, emphasized the similarities between the business

block in Chickasaw, Ala., and the Logan Valley shopping center, and unambiguously concluded:

> "The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*." 391 U. S., at 318.

Upon the basis of that conclusion, the Court held that the First and Fourteenth Amendments required reversal of the judgment of the Pennsylvania Supreme Court.

There were three dissenting opinions in the *Logan Valley* case, one of them by the author of the Court's opinion in *Marsh*, Mr. Justice Black. His disagreement with the Court's reasoning was total:

> "In affirming petitioners' contentions the majority opinion relies on *Marsh* v. *Alabama, supra,* and holds that respondents' property has been transformed to some type of public property. But *Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town. . . . I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a 'town.'" 391 U. S., at 330–331 (footnote omitted).
>
> "The question is, Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town, *i. e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated.' 326 U. S., at 502. I

> can find nothing in *Marsh* which indicates that if one of these features is present, *e. g.*, a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it." *Id.*, at 332.
>
> "To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country. . . ." *Id.*, at 332–333.

Four years later the Court had occasion to reconsider the *Logan Valley* doctrine in *Lloyd Corp.* v. *Tanner*, 407 U. S. 551. That case involved a shopping center covering some 50 acres in downtown Portland, Ore. On a November day in 1968 five young people entered the mall of the shopping center and distributed handbills protesting the then ongoing American military operations in Vietnam. Security guards told them to leave, and they did so, "to avoid arrest." *Id.*, at 556. They subsequently brought suit in a Federal District Court, seeking declaratory and injunctive relief. The trial court ruled in their favor, holding that the distribution of handbills on the shopping center's property was protected by the First and Fourteenth Amendments. The Court of Appeals for the Ninth Circuit affirmed the judgment, 446 F. 2d 545, expressly relying on this Court's *Marsh* and *Logan Valley* decisions. This Court reversed the judgment of the Court of Appeals.

The Court in its *Lloyd* opinion did not say that it was overruling the *Logan Valley* decision. Indeed, a substantial portion of the Court's opinion in *Lloyd* was devoted to pointing out the differences between the two cases, noting particularly that, in contrast to the handbilling in *Lloyd*, the picketing in *Logan Valley* had been

specifically directed to a store in the shopping center and the pickets had had no other reasonable opportunity to reach their intended audience. 407 U. S., at 561–567.[5] But the fact is that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*.

It matters not that some Members of the Court may continue to believe that the *Logan Valley* case was rightly decided.[6] Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be. And in the performance of that duty we make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case.[7] Not only did the *Lloyd* opinion incorporate lengthy excerpts from two of the dissenting opinions in *Logan Valley*, 407 U. S., at 562–563, 565; the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*:

> "The basic issue in this case is whether respondents, in the exercise of asserted First Amendment

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[5] Insofar as the two shopping centers differed as such, the one in *Lloyd* more closely resembled the business section in Chickasaw, Ala.:

"The principal differences between the two centers are that the Lloyd Center is larger than Logan Valley, that Lloyd Center contains more commercial facilities, that Lloyd Center contains a range of professional and nonprofessional services that were not found in Logan Valley, and that Lloyd Center is much more intertwined with public streets than Logan Valley. Also, as in *Marsh, supra*, Lloyd's private police are given full police power by the city of Portland, even though they are hired, fired, controlled, and paid by the owners of the Center. This was not true in *Logan Valley*." 407 U. S., at 575 (MARSHALL, J., dissenting).

[6] See *id.*, at 570 (MARSHALL, J., dissenting).

[7] This was the entire thrust of MR. JUSTICE MARSHALL's dissenting opinion in the *Lloyd* case. See *id.*, at 584.

rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against *all* handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only. . . ." 407 U. S., at 567.

"Respondents contend . . . that the property of a large shopping center is 'open to the public,' serves the same purposes as a 'business district' of a municipality, and therefore has been dedicated to certain types of public use. The argument is that such a center has sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town.

"The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, *Marsh* v. *Alabama, supra,* involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power." *Id.,* at 568–569 (footnote omitted).

> "We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights. . . ." *Id.*, at 570.

If a large self-contained shopping center *is* the functional equivalent of a municipality, as *Logan Valley* held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content.[8] For while a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, see *Cox* v. *New Hampshire*, 312 U. S. 569; *Poulos* v. *New Hampshire*, 345 U. S. 395, and may even forbid altogether such use of some of its facilities, see *Adderley* v. *Florida*, 385 U. S. 39; what a municipality may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression, *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95.[9] It conversely follows, therefore, that if the respondents in the *Lloyd* case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment

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[8] MR. JUSTICE WHITE clearly recognized this principle in his *Logan Valley* dissenting opinion. 391 U. S., at 339.

[9] The Court has in the past held that some expression is not protected "speech" within the meaning of the First Amendment. *Roth* v. *United States*, 354 U. S. 476; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.

right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co.

We conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this.

III

From what has been said it follows that the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act. Under the Act the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, "and to seek a proper accommodation between the two." *Central Hardware Co.* v. *NLRB*, 407 U. S., at 543. What is "a proper accommodation" in any situation may largely depend upon the content and the context of the § 7 rights being asserted. The task of the Board and the reviewing courts under the Act, therefore, stands in conspicuous contrast to the duty of a court in applying the standards of the First Amendment, which requires "above all else" that expression must not be restricted by government "because of its message, its ideas, its subject matter, or its content."

In the *Central Hardware* case, and earlier in the case of *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, the Court considered the nature of the Board's task in this area under the Act. Accommodation between employees' § 7 rights and employers' property rights, the Court said in *Babcock & Wilcox*, "must be obtained with as little destruction of one as is consistent with the maintenance of the other." 351 U. S., at 112.

Both *Central Hardware* and *Babcock & Wilcox* involved organizational activity carried on by nonemployees on the employers' property.[10] The context of the § 7

[10] A wholly different balance was struck when the organizational

activity in the present case was different in several respects which may or may not be relevant in striking the proper balance. First, it involved lawful economic strike activity rather than organizational activity. See *Steelworkers* v. *NLRB*, 376 U. S. 492, 499; *Bus Employees* v. *Missouri*, 374 U. S. 74, 82; *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 234. Cf. *Houston Insulation Contractors Assn.* v. *NLRB*, 386 U. S. 664, 668–669. Second, the § 7 activity here was carried on by Butler's employees (albeit not employees of its shopping center store), not by outsiders. See *NLRB* v. *Babcock & Wilcox Co.*, *supra*, at 111–113. Third, the property interests impinged upon in this case were not those of the employer against whom the § 7 activity was directed, but of another.[11]

The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other."[12] The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance. See *NLRB* v. *Babcock & Wilcox*, *supra*, at 112; cf. *NLRB* v. *Erie Resistor Corp.*, *supra*, at 235–

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activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests were there involved. *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793. This difference is "one of substance." *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S., at 113.

[11] This is not to say that Hudgens was not a statutory "employer" under the Act. See n. 3, *supra*.

[12] 351 U. S., at 112. This language was explicitly reaffirmed as stating "the guiding principle" in *Central Hardware Co.* v. *NLRB*, 407 U. S. 539, 544.

236; *NLRB* v. *Truckdrivers Union,* 353 U. S. 87, 97. "The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." *NLRB* v. *Weingarten, Inc.,* 420 U. S. 251, 266.

For the reasons stated in this opinion, the judgment is vacated and the case is remanded to the Court of Appeals with directions to remand to the National Labor Relations Board, so that the case may be there considered under the statutory criteria of the National Labor Relations Act alone.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.

Although I agree with MR. JUSTICE WHITE's view concurring in the result that *Lloyd Corp.* v. *Tanner,* 407 U. S. 551 (1972), did not overrule *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308 (1968), and that the present case can be distinguished narrowly from *Logan Valley,* I nevertheless have joined the opinion of the Court today.

The law in this area, particularly with respect to whether First Amendment or labor law principles are applicable, has been less than clear since *Logan Valley* analogized a shopping center to the "company town" in *Marsh* v. *Alabama,* 326 U. S. 501 (1946). Mr. Justice Black, the author of the Court's opinion in *Marsh,* thought the decisions were irreconcilable.[1] I now agree

[1] In his dissent in *Logan Valley,* Mr. Justice Black stated that "*Marsh* was never intended to apply to this kind of situation. . . . [T]he basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town

with Mr. Justice Black that the opinions in these cases cannot be harmonized in a principled way. Upon more mature thought, I have concluded that we would have been wiser in *Lloyd Corp.* to have confronted this disharmony rather than draw distinctions based upon rather attenuated factual differences.[2]

The Court's opinion today clarifies the confusion engendered by these cases by accepting Mr. Justice Black's reading of *Marsh* and by recognizing more sharply the distinction between the First Amendment and labor law issues that may arise in cases of this kind. It seems to me that this clarification of the law is desirable.

MR. JUSTICE WHITE, concurring in the result.

While I concur in the result reached by the Court, I find it unnecessary to inter *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), and therefore do not join the Court's opinion. I agree that "the constitutional guarantee of free expression has no part to play in a case such as this," *ante*, at 521; but *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), did not overrule *Logan Valley*, either expressly or implicitly, and I would not, somewhat after the fact, say that it did.

One need go no further than *Logan Valley* itself, for the First Amendment protection established by *Logan Valley* was expressly limited to the picketing of a specific store for the purpose of conveying information with respect to the operation in the shopping center of *that* store:

"The picketing carried on by petitioners was

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and was exactly like any other town in Alabama. I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama." 391 U. S., at 330, 331.

[2] The editorial "we" above is directed primarily to myself as the author of the Court's opinion in *Lloyd Corp.*

> directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." 391 U. S., at 320 n. 9.

On its face, *Logan Valley* does not cover the facts of this case. The pickets of the Butler Shoe Co. store in the North DeKalb Shopping Center were not purporting to convey information about the "manner in which that particular [store] was being operated" but rather about the operation of a warehouse not located on the center's premises. The picketing was thus not "directly related in its purpose to the use to which the shopping center property was being put."

The First Amendment question in this case was left open in *Logan Valley*. I dissented in *Logan Valley*, 391 U. S., p. 337, and I see no reason to extend it further. Without such extension, the First Amendment provides no protection for the picketing here in issue and the Court need say no more. *Lloyd* v. *Tanner* is wholly consistent with this view. There is no need belatedly to overrule *Logan Valley*, only to follow it as it is.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today holds that the First Amendment poses no bar to a shopping center owner's prohibiting speech within his shopping center. After deciding this far-reaching constitutional question, and overruling *Food*

Employees v. *Logan Valley Plaza*, 391 U. S. 308 (1968), in the process, the Court proceeds to remand for consideration of the statutory question whether the shopping center owner in this case unlawfully interfered with the Butler Shoe Co. employees' rights under § 7 of the National Labor Relations Act, 29 U. S. C. § 157.

In explaining why it addresses any constitutional issue at all, the Court observes simply that the history of the litigation has been one of "shifting positions on the part of the litigants, the Board, and the Court of Appeals," *ante*, at 512, as to whether relief was being sought, or granted, under the First Amendment, under § 7 of the Act, or under some combination of the two. On my reading, the Court of Appeals' decision and, even more clearly, the Board's decision here for review, were based solely on § 7, not on the First Amendment; and this Court ought initially consider the statutory question without reference to the First Amendment—the question on which the Court remands. But even under the Court's reading of the opinions of the Board and the Court of Appeals, the statutory question on which it remands is now before the Court. By bypassing that question and reaching out to overrule a constitutionally based decision, the Court surely departs from traditional modes of adjudication.

I would affirm the judgment of the Court of Appeals on purely statutory grounds. And on the merits of the only question that the Court decides, I dissent from the overruling of *Logan Valley*.

I

The Court views the history of this litigation as one of "shifting positions" and "considerable confusion." To be sure, the Board's position has not been constant. But the ultimate decisions by the Administrative Law Judge

and by the Board rested solely on § 7 of the NLRA, not on the First Amendment.

As the Court indicates, the Board's initial determination that petitioner violated § 8 (a)(1) of the Act, 29 U. S. C. § 158 (a)(1), was based on its reading of *Logan Valley*, a First Amendment case. But before the Court of Appeals reviewed this initial determination, this Court decided *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), and *Central Hardware Co.* v. *NLRB*, 407 U. S. 539 (1972), and the Board moved to have the case remanded for reconsideration in light of these two decisions. The Court of Appeals granted the motion.

Lloyd and *Central Hardware* demonstrated, each in its own way, that *Logan Valley* could not be read as broadly as some Courts of Appeals had read it. And together they gave a signal to the Board and to the Court of Appeals that it would be wise to pass upon statutory contentions in cases of this sort before turning to broad constitutional questions, the answers to which could no longer be predicted with certainty. See *Central Hardware, supra*, at 548, 549 (MARSHALL, J., dissenting); *Lloyd, supra*, at 584 (MARSHALL, J., dissenting). Taking heed of this signal, the Administrative Law Judge and the Board proceeded on remand to assess the conflicting rights of the employees and the shopping center owner within the framework of the NLRA. The Administrative Law Judge's recommendation that petitioner be found guilty of a § 8 (a)(1) violation rested explicitly on the statutory test enunciated by this Court in *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956). That the Administrative Law Judge supported his "realistic view of the facts" by referring to this Court's "factual view" of the *Logan Valley* case surely cannot be said to alter the judge's explicitly stated legal theory, which was a statutory one.

Even more clearly, the Board's rationale in agreeing with the Administrative Law Judge's recommendation was exclusively a statutory one. Nowhere in the Board's decision, *Hudgens* v. *Local 315, Retail, Wholesale & Dept. Store Union,* 205 N. L. R. B. 628 (1973), is there any reference to the First Amendment or any constitutionally based decision. The Board reached its result "for the reasons specifically set forth in *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings,*" [1] *ibid.,* a case decided solely on § 7 grounds. In *Visceglia* the Board had specifically declined to treat the picketing area in question as the functional equivalent of a business block and rejected the applicability of *Logan Valley*'s First Amendment analysis, finding an interference with § 7 rights under a "modified" *Babcock & Wilcox* test.[2] When the Board in this case relied upon the rationale of *Visceglia,* it was evidently proceeding under the assumption that the First Amendment had no application. Its ultimate conclusion that petitioner violated § 8 (a)(1) of the Act was purely the result of an "accommodation between [his] property rights and the employees' Section 7 rights." 205 N. L. R. B. 628.

The Court acknowledges that the Court of Appeals' enforcement of the Board's order was based on its view of the employees' § 7 rights. But the Court suggests that the following reference to *Lloyd,* a constitutional

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[1] 203 N. L. R. B. 265 (1973), enforcement denied, *NLRB* v. *Visceglia,* 498 F. 2d 43 (CA3 1974).

[2] The Board found the "principles of *Babcock & Wilcox* . . . to be applicable," 203 N. L. R. B., at 266–267, but seized upon a factual distinction that the *Babcock & Wilcox* Court had itself suggested—namely, the distinction between activity by employees, as in *Visceglia,* and activity by nonemployees, as in *Babcock & Wilcox.*

case, indicates that the Court of Appeals' decision was infected with constitutional considerations:

> "*Lloyd* burdens the General Counsel with the duty to prove that other locations less intrusive upon Hudgens' property rights than picketing inside the mall were either unavailable or ineffective." 501 F. 2d 161, 169.

A reading of the entire Court of Appeals' opinion, however, demonstrates that this language was not intended to inject any constitutional considerations into the case. The Court of Appeals' analysis began with an evaluation of the statutory criteria urged by the parties.[3] Rejecting both parties' formulations of the appropriate statutory standard, the Court of Appeals adopted a modified version of an approach, suggested by an *amicus*, that incorporates a consideration of the relationship of the protest to the use to which the private property in question is put, and the availability of reasonably effective alternative means of communicating with the intended audience. While the *amicus* had derived its approach from *Lloyd* and *Logan Valley*, two constitutional cases, the Court of Appeals was careful to note that the approach it applied was a statutory, not a constitutional one:

> "Section 7 rights are not necessarily coextensive

[3] The Board's General Counsel urged a rule, based upon *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1945), that the employee pickets could not be excluded from the shopping center unless it could be shown that the picketing interfered with the center's normal functioning. While the Board's General Counsel thus did not rely on *Babcock & Wilcox*, the basis for the Board's decision, he still relied on a statutory case, not a constitutional one.

Petitioner argued in the Court of Appeals that under *Babcock & Wilcox* the picketing could be prohibited unless it could be shown that there were no other available channels of communication with the intended audience.

> with constitutional rights, *see* Central Hardware v. NLRB, *supra* ([MARSHALL], J., dissenting). Nevertheless, we agree that the rule suggested by amicus, although having its genesis in the constitutional issues raised in *Lloyd*, isolates the factors relevant to determining when private property rights of a shopping center owner should be required to yield to the section 7 rights of labor picketers." 501 F. 2d, at 167.

With that explanation of the Court of Appeals' view of the relevance of *Lloyd*, it is evident that the subsequent reference to *Lloyd*, quoted out of context by the Court, was not intended to alter the purely statutory basis of the Court of Appeals' decision.[4]

In short, the Board's decision was clearly unaffected by constitutional considerations, and I do not read the Court of Appeals' opinion as intimating that its statutory result was constitutionally mandated. In its present posture, the case presents no constitutional question to the Court. Surely it is of no moment that the Board through its counsel now urges this Court to decide, as part of its statutory analysis, what result is compelled by the First Amendment. The posture of the case is determined by the decisions of the Board and the Court of Appeals, not by the arguments advanced in the Board's brief. Since I read those decisions as purely statutory ones, I would proceed to consider the purely statutory question whether, assuming that petitioner is not restricted by the First Amendment, his actions never-

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[4] Indeed, the Court of Appeals quite clearly viewed the Administrative Law Judge's recommendation and the Board's decision as statutorily based. And the court did not even make the factual finding of functional equivalence to a business district that it recognized as a prerequisite to the application of the First Amendment. 501 F. 2d, at 164.

theless violated § 7 of the Act. This is precisely the issue on which the Court remands the case.

At the very least it is clear that neither the Board nor the Court of Appeals decided the case *solely* on First Amendment grounds. The Court itself acknowledges that both decisions were based on § 7. The most that can be said, and all that the Court suggests, is that the Court of Appeals' view of § 7 was colored by the First Amendment. But even if that were the case, this Court ought not decide any First Amendment question—particularly in a way that requires overruling one of our decisions—without first considering the statutory question without reference to the First Amendment. It is a well-established principle that constitutional questions should not be decided unnecessarily. See, *e. g., Hagans* v. *Lavine,* 415 U. S. 528, 543, 549 (1974); *Rosenberg* v. *Fleuti,* 374 U. S. 449 (1963); *Ashwander* v. *TVA,* 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring). If the Court of Appeals disregarded that principle, that is no excuse for this Court's doing so.

As already indicated, the Board, through its counsel, urges the Court to apply First Amendment considerations in defining the scope of § 7 of the Act. The Board takes this position because it is concerned that the scope of § 7 not fall short of the scope of the First Amendment, the result of which would be that picketing employees could obtain greater protection by court suits than by invoking the procedures of the NLRA. While that general concern is a legitimate one, it does not justify the constitutional adjudication undertaken by the Court. If it were undisputed that the pickets in this case enjoyed some degree of First Amendment protection against interference by petitioner, it might be difficult to separate a consideration of the scope of that First Amendment protection from an analysis of the scope of

protection afforded by § 7. But the constitutional question that the Court decides today is whether the First Amendment operates to restrict petitioner's actions in any way at all, and that question is clearly severable, at least initially, from a consideration of § 7's scope—as proved by the Court's remand of the case.

Thus even if, as the Court suggests, the Court of Appeals' view of § 7 was affected by the First Amendment, the Court still could have proceeded initially to decide the statutory question divorced of constitutional considerations. I cannot understand the Court's bypassing that purely statutory question to overrule a First Amendment decision less than 10 years old. And I certainly cannot understand the Court's remand of the purely statutory question to the Board, whose decision was so clearly unaffected by any constitutional considerations that the Court does not even suggest otherwise.

II

On the merits of the purely statutory question that I believe is presented to the Court, I would affirm the judgment of the Court of Appeals. To do so, one need not consider whether consumer picketing by employees is subject to a more permissive test under § 7 than the test articulated in *Babcock & Wilcox* for organizational activity by nonemployees. In *Babcock & Wilcox* we stated that an employer "must allow the union to approach his employees on his property" [5] if the employees are "beyond the reach of reasonable efforts to communicate with them," 351 U. S., at 113—that is, if "other means" of communication are not "readily available." *Id.*, at 114. Thus the general standard that emerges

[5] It is irrelevant, in my view, that the property in this case was owned by the shopping center owner rather than by the employer. The nature of the property interest is the same in either case.

from *Babcock & Wilcox* is the ready availability of reasonably effective alternative means of communication with the intended audience.

In *Babcock & Wilcox* itself, the intended audience was the employees of a particular employer, a limited identifiable group; and it was thought that such an audience could be reached effectively by means other than entrance onto the employer's property—for example, personal contact at the employees' living quarters, which were "in reasonable reach." *Id.*, at 113. In this case, of course, the intended audience was different, and what constitutes reasonably effective alternative means of communication also differs. As the Court of Appeals noted, the intended audience in this case "was only identifiable as part of the citizenry of greater Atlanta until it approached the store, and thus for the picketing to be effective, the location chosen was crucial unless the audience could be known and reached by other means." 501 F. 2d, at 168. Petitioner contends that the employees could have utilized the newspapers, radio, television, direct mail, handbills, and billboards to reach the citizenry of Atlanta. But none of those means is likely to be as effective as on-location picketing: the initial impact of communication by those means would likely be less dramatic, and the potential for dilution of impact significantly greater. As this Court has observed:

> "Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word." *Hughes* v. *Superior Court*, 339 U. S. 460, 465 (1950).

In addition, all of the alternatives suggested by petitioner are considerably more expensive than on-site picketing. Certainly *Babcock & Wilcox* did not require resort to the mass media,[6] or to more individualized efforts on a scale comparable to that which would be required to reach the intended audience in this case.

Petitioner also contends that the employees could have picketed on the public rights-of-way, where vehicles entered the shopping center. Quite apart from considerations of safety, that alternative was clearly inadequate: prospective customers would have had to read the picketers' placards while driving by in their vehicles—a difficult task indeed. Moreover, as both the Board and the Court of Appeals recognized, picketing at an entrance used by customers of all retail establishments in the shopping center, rather than simply customers of the Butler Shoe Co. store, may well have invited undesirable secondary effects.

In short, I believe the Court of Appeals was clearly correct in concluding that "alternatives to picketing inside the mall were either unavailable or inadequate." 501 F. 2d, at 169. Under *Babcock & Wilcox*, then, the picketing in this case was protected by § 7. I would affirm the judgment of the Court of Appeals on that basis.

III

Turning to the constitutional issue resolved by the Court, I cannot escape the feeling that *Logan Valley* has been laid to rest without ever having been accorded a proper burial. The Court today announces that "the ultimate holding in *Lloyd* amounted to a total rejection

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[6] The only alternative means of communication referred to in *Babcock & Wilcox* were "personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees." 351 U. S., at 111.

of the holding in *Logan Valley*." *Ante*, at 518. To be sure, some Members of the Court, myself included, believed that *Logan Valley* called for a different result in *Lloyd* and alluded in dissent to the possibility that "it is *Logan Valley* itself that the Court finds bothersome." 407 U. S., at 570, 584 (MARSHALL, J., dissenting). But the fact remains that *Logan Valley* explicitly reserved the question later decided in *Lloyd*, and *Lloyd* carefully preserved the holding of *Logan Valley*. And upon reflection, I am of the view that the two decisions are reconcilable.

A

In *Logan Valley* the Court was faced with union picketing against a nonunion supermarket located in a large shopping center. Our holding was a limited one:

> "All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' *Marsh* v. *Alabama*, 326 U. S., at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." 391 U. S., at 319–320 (footnote omitted).

We carefully noted that we were "not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not . . . directly related in its purpose to the use to which the shopping center property was being put." *Id.*, at 320 n. 9.

Lloyd involved the distribution of antiwar handbills in a large shopping center, and while some of us viewed

the case differently, 407 U. S., at 570, 577–579 (MARSHALL, J., dissenting), the Court treated it as presenting the question left open in *Logan Valley*. But the Court did no more than decide that question. It preserved the holding of *Logan Valley*, as limited to cases in which (1) the picketing is directly related in its purpose to the use to which the shopping center property is put, and (2) "no other reasonable opportunities for the pickets to convey their message to their intended audience [are] available." 407 U. S., at 563.

The Court today gives short shrift to the language in *Lloyd* preserving *Logan Valley*, and quotes extensively from language that admittedly differs in emphasis from much of the language of *Logan Valley*. But even the language quoted by the Court says no more than that the dedication of the Lloyd Center to public use was more limited than the dedication of the company town in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), and that the pickets in *Lloyd* were not entitled to exercise "the asserted First Amendment rights"—that is, the right to distribute antiwar handbills.

Any doubt about the limited scope of *Lloyd* is removed completely by a consideration of *Central Hardware Co.* v. *NLRB*, 407 U. S. 539 (1972), decided the same day as *Lloyd*. In *Central Hardware* the Court was faced with solicitation by nonemployee union organizers on a parking lot of a retail store that was not part of a shopping center complex—activity clearly related to the use to which the private property had been put. The Court found the activity unprotected by the First Amendment, but in a way that explicitly preserved the holding in *Logan Valley*. The Court could have held that the First Amendment has no application to use-related activity on privately owned business property, thereby rejecting *Logan Valley*, but instead the Court chose to

distinguish the parking lot in *Central Hardware* from the shopping center complex in *Logan Valley*. Rejecting the argument that the opening of property to the general public suffices to activate the prohibition of the First Amendment, the Court explained:

> "This analysis misconceives the rationale of *Logan Valley*. *Logan Valley* involved a large commercial shopping center which the Court found had displaced, in certain relevant respects, the functions of the normal municipal 'business block.' First and Fourteenth Amendment free-speech rights were deemed infringed under the facts of that case when the property owner invoked the trespass laws of the State against the pickets.
>
> "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. . . . The only fact relied upon for the argument that Central's parking lots have acquired the characteristics of a public municipal facility is that they are 'open to the public.' Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*." 407 U. S., at 547 (footnote omitted).

If, as the Court tells us, "the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case," *ante*, at 518, one wonders why the Court in *Central Hardware*, decided the same day as *Lloyd*, implicitly reaffirmed *Logan Valley*'s rationale.

B

It is inescapable that after *Lloyd*, *Logan Valley* remained "good law," binding on the state and federal courts. Our institutional duty in this case, if we consider the constitutional question at all, is to examine whether *Lloyd* and *Logan Valley* can continue to stand side by side, and, if they cannot, to decide which one must fall. I continue to believe that the First Amendment principles underlying *Logan Valley* are sound, and were unduly limited in *Lloyd*. But accepting *Lloyd*, I am not convinced that *Logan Valley* must be overruled.

The foundation of *Logan Valley* consisted of this Court's decisions recognizing a right of access to streets, sidewalks, parks, and other public places historically associated with the exercise of First Amendment rights. *E. g.*, *Hague* v. *CIO*, 307 U. S. 496, 515–516 (1939) (opinion of Roberts, J.); *Schneider* v. *State*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1940); *Cox* v. *New Hampshire*, 312 U. S. 569, 574 (1941); *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Saia* v. *New York*, 334 U. S. 558 (1948). Thus, the Court in *Logan Valley* observed that access to such forums "cannot constitutionally be denied broadly and absolutely." 391 U. S., at 315. The importance of access to such places for speech-related purposes is clear, for they are often the only places for effective speech and assembly.

Marsh v. *Alabama*, *supra*, which the Court purports to leave untouched, made clear that in applying those cases granting a right of access to streets, sidewalks, and other public places, courts ought not let the formalities of title put an end to analysis. The Court in *Marsh* observed that "the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the

property belongs to a private corporation." 326 U. S., at 503. That distinction was not determinative:

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.*, at 506.

Regardless of who owned or possessed the town in *Marsh*, the Court noted, "the public . . . has an identical interest in the functioning of the community in such manner that the channels of communication remain free," *id.*, at 507, and that interest was held to prevail.

The Court adopts the view that *Marsh* has no bearing on this case because the privately owned property in *Marsh* involved all the characteristics of a typical town. But there is nothing in *Marsh* to suggest that its general approach was limited to the particular facts of that case. The underlying concern in *Marsh* was that traditional public channels of communication remain free, regardless of the incidence of ownership. Given that concern, the crucial fact in *Marsh* was that the company owned the traditional forums essential for effective communication; it was immaterial that the company also owned a sewer system and that its property in other respects resembled a town.

In *Logan Valley* we recognized what the Court today refuses to recognize—that the owner of the modern shopping center complex, by dedicating his property to public use as a business district, to some extent displaces the "State" from control of historical First Amendment forums, and may acquire a virtual monopoly of places suitable for effective communication. The roadways, parking lots, and walkways of the modern shopping cen-

ter may be as essential for effective speech as the streets and sidewalks in the municipal or company-owned town.[7] I simply cannot reconcile the Court's denial of any role for the First Amendment in the shopping center with *Marsh*'s recognition of a full role for the First Amendment on the streets and sidewalks of the company-owned town.

My reading of *Marsh* admittedly carried me farther than the Court in *Lloyd*, but the *Lloyd* Court remained responsive in its own way to the concerns underlying *Marsh*. *Lloyd* retained the availability of First Amendment protection when the picketing is related to the function of the shopping center, and when there is no other reasonable opportunity to convey the message to the intended audience. Preserving *Logan Valley* subject to *Lloyd*'s two related criteria guaranteed that the First Amendment would have application in those situations in which the shopping center owner had most clearly monopolized the forums essential for effective communication. This result, although not the optimal one in my view, *Lloyd Corp.* v. *Tanner*, 407 U. S., at 579–583 (MARSHALL, J., dissenting), is nonetheless defensible.

In *Marsh*, the private entity had displaced the "state" from control of all the places to which the public had historically enjoyed access for First Amendment purposes, and the First Amendment was accordingly held fully applicable to the private entity's conduct. The shopping center owner, on the other hand, controls only

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[7] No point would be served by adding to the observations in *Logan Valley* and my dissent in *Lloyd* with respect to the growth of suburban shopping centers and the proliferation of activities taking place in such centers. See *Logan Valley*, 391 U. S., at 324; *Lloyd*, 407 U. S., at 580, 585–586. See also Note, Lloyd Corp. v. Tanner: The Demise of Logan Valley and the Disguise of Marsh, 61 Geo. L. J. 1187, 1216–1219 (1973).

a portion of such places, leaving other traditional public forums available to the citizen. But the shopping center owner may nevertheless control all places essential for the effective undertaking of some speech-related activities—namely, those related to the activities of the shopping center. As for those activities, then, the First Amendment ought to have application under the reasoning of *Marsh,* and that was precisely the state of the law after *Lloyd.*

The Court's only apparent objection to this analysis is that it makes the applicability of the First Amendment turn to some degree on the subject matter of the speech. But that in itself is no objection, and the cases cited by the Court to the effect that government may not "restrict expression because of its message, its ideas, its subject matter, or its content," *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 95 (1972), are simply inapposite. In those cases, it was clearly the government that was acting, and the First Amendment's bar against infringing speech was unquestionably applicable; the Court simply held that the government, faced with a general command to permit speech, cannot choose to forbid some speech because of its message. The shopping center cases are quite different; in these cases the primary regulator is a private entity whose property has "assume[d] to some significant degree the functional attributes of public property devoted to public use." *Central Hardware Co.* v. *NLRB,* 407 U. S., at 547. The very question in these cases is whether, and under what circumstances, the First Amendment has any application at all. The answer to that question, under the view of *Marsh* described above, depends to some extent on the subject of the speech the private entity seeks to regulate, because the degree to which the private entity monopolizes the effective channels of communication

may depend upon what subject is involved.[8] This limited reference to the subject matter of the speech poses none of the dangers of government suppression or censorship that lay at the heart of the cases cited by the Court. See, *e. g.*, *Police Dept. of Chicago* v. *Mosley*, *supra*, at 95–96. It is indeed ironic that those cases, whose obvious concern was the promotion of free speech, are cited today to require its surrender.

In the final analysis, the Court's rejection of any role for the First Amendment in the privately owned shopping center complex stems, I believe, from an overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment's guarantee of freedom of speech. No one would seriously question the legitimacy of the values of privacy and individual autonomy traditionally associated with privately owned property. But property that is privately owned is not always held for private use, and when a property owner opens his property to public use the force of those values diminishes. A degree of privacy is necessarily surrendered; thus, the privacy interest that petitioner retains when he leases space to 60 retail businesses and invites the public onto his land for the transaction of business with other members of the public is small indeed. Cf. *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 65–67 (1973). And while the owner of property open to public use may not automatically surrender any of his autonomy interest in managing the property as he sees fit, there is nothing new about the notion that that autonomy interest must be accommodated with the interests of the public. As

[8] See The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 135–138 (1968).

this Court noted some time ago, albeit in another context:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." *Munn* v. *Illinois,* 94 U. S. 113, 126 (1877).

The interest of members of the public in communicating with one another on subjects relating to the businesses that occupy a modern shopping center is substantial. Not only employees with a labor dispute, but also consumers with complaints against business establishments, may look to the location of a retail store as the only reasonable avenue for effective communication with the public. As far as these groups are concerned, the shopping center owner has assumed the traditional role of the state in its control of historical First Amendment forums. *Lloyd* and *Logan Valley* recognized the vital role the First Amendment has to play in such cases, and I believe that this Court errs when it holds otherwise.

UNITED STATES *v.* GADDIS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74–1141. Argued December 15, 1975—Decided March 3, 1976

Respondents were indicted for entering a federally insured bank with intent to rob it by force and violence (Count 1) and robbing the bank by force and violence (Count 2), in violation of 18 U. S. C. § 2113 (a), with possessing the funds stolen in the robbery (Count 3), in violation of § 2113 (c), and with assaulting four people with dangerous weapons during the robbery (Counts 4–8), in violation of § 2113 (d), and thereafter found guilty and sentenced on all counts. The Court of Appeals reversed, and ordered a new trial on the ground that, as held in *Heflin* v. *United States*, 358 U. S. 415, it was plain error to allow a jury to convict the accused of receiving and possessing the same money taken in the same bank robbery, and that under *Milanovich* v. *United States*, 365 U. S. 551, remanding the case for a new trial was the appropriate appellate remedy. *Held:*

1. A person convicted of violating 18 U. S. C. §§ 2113 (a), (b), and (d) cannot also be convicted of receiving or possessing the robbery proceeds in violation of § 2113 (c). *Heflin, supra*, at 419–420. Pp. 547–548.

2. The Court of Appeals was mistaken in requiring a new trial as the remedy for the trial court's not having dismissed Count 3 for lack of proof, since the error can be corrected by vacating the convictions and sentences under that count. *Milanovich, supra*, distinguished. Pp. 548–549.

3. The sentences under Counts 1 and 2 should also be vacated. *Prince* v. *United States*, 352 U. S. 322. P. 549 n. 12.

506 F. 2d 352, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which all Members joined except STEVENS, J., who took no part in the consideration or decision of the case. WHITE, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 551.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor*

General Bork, Assistant Attorney General Thornburgh, and *Jerome M. Feit.*

Tommy Day Wilcox, by appointment of the Court, 422 U. S. 1005, argued the cause *pro hac vice* and filed a brief for respondents.

MR. JUSTICE STEWART delivered the opinion of the Court.

A federal grand jury in Georgia returned an eight-count indictment against the respondents Gaddis and Birt, charging them with entering a federally insured bank with intent to rob it by force and violence (Count 1) and robbing the bank by force and violence (Count 2), in violation of 18 U. S. C. § 2113 (a);[1] with possessing the funds stolen in the robbery (Count 3), in violation of 18 U. S. C. § 2113 (c);[2] and with assaulting four people

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[1] "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

[2] "(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker."

with dangerous weapons during the course of the robbery (Counts 4 to 8), in violation of 18 U. S. C. § 2113 (d).[3] At the ensuing trial the Government's evidence showed that three armed men had on March 6, 1974, robbed the National Bank of Walton County in Loganville, Ga.,[4] and that the robbers in making their getaway had engaged in an exchange of gunfire with Loganville's lone police officer. The Government's evidence further showed that two of the three robbers had been Gaddis and Birt.[5] The jury found the respondents guilty on all counts of the indictment, and the trial judge sentenced each of them to aggregate prison terms of 25 years.[6] In imposing the prison sentences, the judge stated:

> "[T]he Court realizes that twenty-five years is the maximum, and the cases say that there is a merger of all of those offenses. If there is any question as to the legality of that sentence, that's the Court's intention."

The Court of Appeals for the Fifth Circuit reversed the judgments of conviction and ordered a new trial upon the ground that the District Judge had been in error in permitting the jury to convict the respondents on all

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[3] "(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

[4] Two of the men had entered the bank, brandishing pistols, while the third man had remained in the getaway car outside.

[5] A third man indicted, Billy Wayne Davis, had pleaded guilty and was a principal witness for the Government at the respondents' trial.

[6] The judge imposed 20-year sentences for aggravated bank robbery (18 U. S. C. § 2113 (a)), 25-year sentences for assaults in the course of the bank robbery (§ 2113 (d)), and 10-year sentences for possession of the proceeds of the robbery (§ 2113 (c)), all of the sentences to run concurrently.

eight counts of the indictment. Specifically, the appellate court held that this Court's decision in *Heflin* v. *United States*, 358 U. S. 415, had made it clear that "it is plain error to allow a jury to convict an accused of taking and possessing the same money obtained in the same bank robbery," and that under this Court's decision in *Milanovich* v. *United States*, 365 U. S. 551, "the proper appellate remedy is to remand for a new trial." 506 F. 2d 352, 354. We granted certiorari because of the discordant views in the Circuits regarding the proper application of the *Heflin* and *Milanovich* decisions.[7] 421 U. S. 987.

The Court of Appeals was correct in holding that a person convicted of robbing a bank in violation of 18 U. S. C. §§ 2113 (a), (b), and (d), cannot also be convicted of receiving or possessing the proceeds of that robbery in violation of 18 U. S. C. § 2113 (c). This much was clearly settled in the *Heflin* case. The Court there held that "subsection (c) was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber." 358 U. S., at 419. In "subsection (c) . . . Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves." *Id.*, at 420. Thus, while there was in the present case a "merger" of the convictions under §§ 2113 (a) and (d), *Prince* v. *United States*, 352

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[7] See, *e. g.*, *United States* v. *Sharpe*, 452 F. 2d 1117, 1119 (CA1); *United States* v. *Ploof*, 464 F. 2d 116, 119–120 (CA2); *United States* v. *Roach*, 321 F. 2d 1, 6 (CA3); *Phillips* v. *United States*, 518 F. 2d 108, 110 (CA4); *United States* v. *Sellers*, 520 F. 2d 1281, 1286 (CA4); *United States* v. *Harris*, 346 F. 2d 182, 184 (CA4); *United States* v. *Abercrombie*, 480 F. 2d 961, 964–965 (CA5); *Ethridge* v. *United States*, 494 F. 2d 351 (CA6); *United States* v. *Dixon*, 507 F. 2d 683 (CA8); *United States* v. *Tyler*, 466 F. 2d 920 (CA9); *Keating* v. *United States*, 413 F. 2d 1028 (CA9); *Glass* v. *United States*, 351 F. 2d 678 (CA10).

U. S. 322, the merger could not include the conviction under § 2113 (c). Receipt or possession of the proceeds of a bank robbery in violation of § 2113 (c) is simply not a lesser included offense within the total framework of the bank robbery provisions of § 2113. Rather, § 2113 (c) reaches a different "group of wrongdoers," *i. e.*, "those who receive the loot from the robber."

The Court of Appeals was mistaken, however, in supposing that our decision in *Milanovich* required the ordering of a new trial as the "proper appellate remedy" for the District Judge's error in this case. The very unusual facts in that case were wholly different from those presented here.

In *Milanovich* there was evidence that the petitioner and her husband, "as owners of an automobile, transported three others under an arrangement whereby the three were to break into a United States naval commissary building with a view to stealing government funds," that she and her husband "were to remain outside for the return of their accomplices after the accomplishment of the theft," but that they "drove off without awaiting the return of their friends." [8] If believed by the jury, this evidence was clearly sufficient to support a verdict that the petitioner was guilty of robbing the naval commissary.[9] There was also evidence in *Milanovich*, however, of other and different conduct on the part of the petitioner—that about 17 days after the naval commissary robbery she had obtained and appropriated silver currency taken in the robbery and concealed the same in a suitcase in her home.[10] If believed by the jury, this evidence was clearly sufficient to support a verdict that the petitioner was guilty of receiving and concealing the

[8] 365 U. S., at 557 (dissenting opinion).

[9] 18 U. S. C. §§ 641, 2.

[10] 365 U. S., at 554–555, n. 5.

stolen property.[11] The trial judge refused to instruct the jury that the petitioner could not be convicted for both stealing and receiving the same currency, and she was convicted and separately sentenced on both counts. This Court held that under *Heflin* the jury should have been instructed that the petitioner could not be separately convicted for stealing and receiving the proceeds of the same theft. Since it was impossible to say upon which count, if either, a properly instructed jury would have convicted the petitioner, and in view of the grossly disparate sentences imposed upon the petitioner and upon her husband (who was convicted only upon the larceny count), her convictions were set aside and the case was remanded for a new trial.

The present case is of a very different order. While the evidence was certainly sufficient to support a jury verdict that the respondents were guilty beyond a reasonable doubt of aggravated bank robbery, there was no evidence whatever that they were guilty of receiving the proceeds "from the robber." Indeed, except for the evidence of asportation during the robbery itself, there was nothing to show that the respondents had ever received or possessed the bank's funds. Their share of the loot was, in fact, never found. Accordingly, the trial judge should have dismissed Count 3 of the indictment. His error in not doing so can be fully corrected now by the simple expedient of vacating the convictions and sentences under that count.[12]

In many prosecutions under 18 U. S. C. § 2113 the evidence will not, of course, be so clearcut as in the

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[11] 18 U. S. C. § 641.

[12] In light of *Prince* v. *United States*, 352 U. S. 322, the concurrent sentences under Counts 1 and 2 should also be vacated, leaving the respondents under single 25-year prison sentences for violating 18 U. S. C. § 2113 (d).

present case. Situations will no doubt often exist where there is evidence before a grand jury or prosecutor that a certain person participated in a bank robbery and also evidence that that person, though not himself the robber, at least knowingly received the proceeds of the robbery.[13] In such a case there can be no impropriety for a grand jury to return an indictment or for a prosecutor to file an information containing counts charging violations of 18 U. S. C. § 2113 (a), (b), or (d), as well as of § 2113 (c).[14] If, upon the trial of the case the District Judge is satisfied that there is sufficient evidence to go to the jury upon both counts, he must, under *Heflin* and *Milanovich,* instruct the members of the jury that they may not convict the defendant both for robbing a bank and for receiving the proceeds of the robbery. He should instruct them that they must first consider the charges under § 2113 (a), (b), or (d), and should consider the charge under § 2113 (c) only if they find insufficient proof that the defendant himself was a participant in the robbery.[15]

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[13] Such a case is not hard to hypothesize. A grand jury or prosecutor may often possess clear evidence that the proceeds of a bank robbery were found in a certain person's possession, and less certain eyewitness or circumstantial evidence that that person was an actual participant in the robbery.

[14] The statement to the contrary in a dissenting opinion in *Milanovich,* 365 U. S., at 558, is incorrect.

[15] If, on the other hand, the indictment or information charges only a violation of § 2113 (c), it is incumbent upon the prosecution at trial to prove beyond a reasonable doubt only the elements of that offense, and the identity of the participant or participants in the robbery or theft is irrelevant to the issue of the defendant's guilt. While a mechanistic reading of *Heflin*'s language might not wholly support this rule, it is to be remembered that *Heflin* ultimately held no more than that a person could not be convicted and separately sentenced under § 2113 (a), (b), or (d) *and* under § 2113 (c) because § 2113 (c) could not be used to "pyramid penalties." 358

For the reasons stated, the judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, concurring.

Because the Court deems this case distinguishable from *Milanovich* v. *United States,* 365 U. S. 551 (1961), it sees no occasion to consider the continuing validity of that decision; and I do not read the Court's opinion as reaffirming, in addition to describing, the *Milanovich* rule that a new trial is required when (1) a jury is erroneously permitted to convict a defendant both of bank robbery, 18 U. S. C. § 2113 (a), (b), or (d), and of knowing possession of the proceeds of that robbery, 18 U. S. C. § 2113 (c), and (2) there is evidence to support both convictions.

As the Court states, a jury, having convicted on the robbery count, should stop there without going on to consider the possession count. If the jury is erroneously permitted, however, to consider and convict on the possession count as well, such a conviction casts absolutely no doubt on the validity of the robbery conviction. Under such circumstances it is not impossible to say upon which count, if either, a properly instructed jury would have convicted the defendant. It may be concluded with satisfactory certainty that the jury, having convicted for both offenses, would have convicted of robbery if it had been properly instructed. The verdict on the robbery count shows that the jury found each element of that

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U. S., at 419. *Heflin* did not purport to, and did not, add to or alter the statutory elements of the offense under § 2113 (c).

offense to have been established beyond a reasonable doubt. That the jury went on to find that the defendant also possessed the proceeds of the robbery—whether on a different date and on different proof or not—casts no doubt on the trustworthiness of the findings on the robbery count. The problem of erroneously permitting the jury to consider and convict on two counts—on each of which, considered separately, the jury was properly instructed—when they should have considered and convicted on only one bears no relation to that presented in *Stromberg* v. *California*, 283 U. S. 359 (1931), in which the jury was permitted to convict on a single count on both a valid and an invalid theory. In *Stromberg*, it was impossible to know whether a properly instructed jury would have convicted the defendant of anything. In the class of cases governed by *Milanovich*, the robbery count is untainted by the fact that in addition to its finding of guilty on that count the jury also made findings on the possession count, for those findings are factually consistent with the findings on the robbery count.

In all cases in which the court correctly instructs the jury on the elements of the crime of robbery, any resulting conviction and sentence should be sustained. In those cases in which the jury also convicts of possession, that conviction and any sentence on it should simply be vacated.* A new trial on the robbery count in any such

*If district judges instruct juries as the majority opinion requires, this problem will not arise. However, since this Court's decision in *Milanovich* v. *United States*, 365 U. S. 551 (1961), district judges should have been instructing juries not to consider possession counts, if they convict of robbery. As this case and others attest, *e. g.*, *United States* v. *Sellers*, 520 F. 2d 1281 (CA4 1975), cert. pending, Nos. 74–1476 and 74–6503; *Phillips* v. *United States*, 518 F. 2d 108 (CA4 1975) (en banc), cert. pending, Nos. 75–167 and 75–5457; *United States* v. *Dixon*, 507 F. 2d 683 (CA8 1974), cert. pending,

case would result in an expenditure of court resources and the possibility of an acquittal—through loss of evidence or other causes—of a reliably convicted defendant for no reason.

No. 74–5869, district judges have nonetheless made mistakes, and there is no reason to believe that the mistakes will completely cease just because the Court today reiterates the correct instructions.

HINES ET AL. *v.* ANCHOR MOTOR FREIGHT, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 74–1025. Argued November 12, 1975—Decided March 3, 1976

Petitioner employees were discharged by respondent employer for alleged dishonesty. Respondent union, claiming that petitioners were innocent, opposed the discharges, and pursuant to the collective-bargaining contract the matter was submitted to an arbitration committee, which upheld the discharges. The collective-bargaining contract provided that a decision by the arbitration committee would be final and binding on all parties, including the employees affected. However, when subsequent information indicated that the charges of dishonesty might have been false, petitioners brought a wrongful-discharge suit against the employer and union under § 301 of the Labor Management Relations Act, alleging that the falsity of the charges could have been discovered with a minimum of investigation, and that the union had made no effort to ascertain the truth and thereby had violated its duty of fair representation by arbitrarily and in bad faith depriving petitioners of their employment and permitting their discharge without sufficient proof. The District Court granted summary judgment for respondents on the ground that the arbitration committee's decision was final and binding absent a showing of bad faith, arbitrariness, or perfunctoriness on the union's part. Concluding that there were sufficient facts from which to infer bad faith or arbitrary conduct on the union's part and that petitioners should have been afforded an opportunity to prove their charges, the Court of Appeals reversed the District Court to that extent, but affirmed the judgment in the employer's favor on the ground that the finality provision of the collective-bargaining contract had to be observed unless evidence showed misconduct by the employer or a conspiracy between it and the union. *Held:* It was improper to dismiss petitioners' suit against respondent employer, since if petitioners prove an erroneous discharge and respondent union's breach of duty of fair representation tainting the arbitration committee's decision, they are entitled to an appro-

priate remedy against the employer as well as the union. Pp. 561–572.

(a) A union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual procedures and, if it seriously undermines the integrity of the arbitral process, also removes the bar of the finality provision of the contract. Pp. 567–569.

(b) Respondent employer, if the charges of dishonesty were in error, played its part in precipitating the dispute, and though the employer may not have knowingly or negligently relied on false evidence in discharging petitioners and may have prevailed before the arbitration committee after presenting its case by fair procedures, petitioners should not be foreclosed from their § 301 remedy otherwise available against the employer if the contractual processes have been seriously flawed by the union's breach of its duty. Pp. 569–570.

(c) While the grievance processes cannot be expected to be error-free, enforcement of the finality provision where the arbitrator has erred is conditioned upon the union's having satisfied its statutory duty fairly to represent the employees in connection with arbitration proceedings; otherwise, a wrongfully discharged employee would be left without a job and a fair opportunity to secure an adequate remedy. Pp. 570–571.

506 F. 2d 1153, reversed in part.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a concurring opinion, *post*, p. 572. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 573. STEVENS, J., took no part in the consideration or decision of the case.

Niki Z. Schwartz argued the cause and filed briefs for petitioners.

Bernard S. Goldfarb argued the cause and filed a brief for respondent Anchor Motor Freight, Inc. *David Leo Uelmen* and *Eugene Green* filed a brief for respondent Local Union No. 377. *David Previant* and *George Kaufmann* filed a brief for respondent International Brother-

hood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether a suit against an employer by employees asserting breach of a collective-bargaining contract was properly dismissed where the accompanying complaint against the union for breach of duty of fair representation has withstood the union's motion for summary judgment and remains to be tried.

I

Petitioners,[1] who were formerly employed as truck drivers by respondent Anchor Motor Freight, Inc. (Anchor), were discharged on June 5, 1967. The applicable collective-bargaining contract forbade discharges without just cause. The company charged dishonesty. The practice at Anchor was to reimburse drivers for money spent for lodging while the drivers were on the road overnight. Anchor's assertion was that petitioners had sought reimbursement for motel expenses in excess of the actual charges sustained by them. At a meeting between the company and the union, Local 377, International Brotherhood of Teamsters (Union), which was also attended by petitioners, Anchor presented motel receipts previously submitted by petitioners which were in excess of the charges shown on the motel's registration cards; a notarized statement of the motel clerk asserting

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Arthur L. Fox II filed a brief for Prod, Inc., et al. as *amici curiae* urging reversal.

[1] Two of the original petitioners, Burtice A. Hines and Arthur D. Cartwright, are deceased. Charles A. Hines and Chyra J. Cartwright have been substituted as party petitioners. 423 U. S. 816, 982 (1975).

the accuracy of the registration cards; and an affidavit of the motel owner affirming that the registration cards were accurate and that inflated receipts had been furnished petitioners. The Union claimed petitioners were innocent and opposed the discharges. It was then agreed that the matter would be presented to the joint arbitration committee for the area, to which the collective-bargaining contract permitted either party to submit an unresolved grievance.[2] Pending this hearing, petitioners were reinstated. Their suggestion that the motel be investigated was answered by the Union representatives' assurances that "there was nothing to worry about" and that they need not hire their own attorney.

A hearing before the joint area committee was held on July 26, 1967. Anchor presented its case. Both the Union and petitioners were afforded an opportunity to present their case and to be heard. Petitioners denied their dishonesty, but neither they nor the Union presented any other evidence contradicting the documents presented by the company. The committee sustained

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[2] The contractual grievance procedure is set out in Art. 7 of the Central Conference Area Supplement to the National Master Automobile Transporters Agreement. App. 226–233. Grievances were to be taken up by the employee involved and if no settlement was reached, were then to be considered by the business agent of the local union and the employer representative. If the dispute remained unresolved, either party had the right to present the case for decision to the appropriate joint area arbitration committee. These committees are organized on a geographical area basis and hear grievances in panels made up of an equal number of representatives of the parties to the collective-bargaining agreement. Cases that deadlocked before the joint area committee could be taken to a panel of the national joint arbitration committee, composed like the area committee panels of an equal number of representatives of the parties to the agreement. If unresolved there, they would be resolved by a panel including an impartial arbitrator. The joint arbitration committee for the Detroit area is involved in this case.

the discharges. Petitioners then retained an attorney and sought rehearing based on a statement by the motel owner that he had no personal knowledge of the events, but that the discrepancy between the receipts and the registration cards could have been attributable to the motel clerk's recording on the cards less than was actually paid and retaining for himself the difference between the amount receipted and the amount recorded. The committee, after hearing, unanimously denied rehearing "because there was no new evidence presented which would justify a reopening of this case." App. 212.

There were later indications that the motel clerk was in fact the culprit; and the present suit was filed in June 1969, against Anchor, the Union, and its International. The complaint alleged that the charges of dishonesty made against petitioners by Anchor were false, that there was no just cause for discharge, and that the discharges had been in breach of contract. It was also asserted that the falsity of the charges could have been discovered with a minimum of investigation, that the Union had made no effort to ascertain the truth of the charges, and that the Union had violated its duty of fair representation by arbitrarily and in bad faith depriving petitioners of their employment and permitting their discharge without sufficient proof.

The Union denied the charges and relied on the decision of the joint area committee. Anchor asserted that petitioners had been properly discharged for just cause. It also defended on the ground that petitioners, diligently and in good faith represented by the Union, had unsuccessfully resorted to the grievance and arbitration machinery provided by the contract and that the adverse decision of the joint arbitration committee was binding upon the Union and petitioners under the contractual provision declaring that "[a] decision by a majority of a

Panel of any of the Committees shall be final and binding on all parties, including the employee and/or employees affected." [3] Discovery followed, including a deposition of the motel clerk revealing that he had falsified the records and that it was he who had pocketed the difference between the sums shown on the receipts and the registration cards. Motions for summary judgment filed by Anchor and the Unions were granted by the District Court on the ground that the decision of the arbitration committee was final and binding on the employees and "for failure to show facts comprising bad faith, arbitrariness or perfunctoriness on the part of the Unions." 72 CCH Lab. Cas. ¶ 13,987, p. 28,131 (ND Ohio 1973). Although indicating that the acts of the Union "may not meet professional standards of competency, and while it might have been advisable for the Union to further investigate the charges . . . ," the District Court concluded that the facts demonstrated at most bad judgment on the part of the Union, which was insufficient to prove a breach of duty or make out a prima facie case against it. *Id.*, at 28,132.

After reviewing the allegations and the record before it, the Court of Appeals concluded that there were sufficient facts from which bad faith or arbitrary conduct on the part of the local Union could be inferred by the trier of fact and that petitioners should have been afforded an opportunity to prove their charges.[4] To

[3] The provision is contained in § 5 of Art. 7. App. 231. In addition, § 7 (c) of the same article provides that all decisions of the national and area committees with respect to the interpretation of the contract "shall be final and conclusive and binding upon the Employer and the Union, and the employees involved." App. 232.

[4] As summarized by the Court of Appeals, the allegations relied on were:

"They consist of the motel clerk's admission, made a year after the discharge was upheld in arbitration, that he, not plaintiffs,

this extent the judgment of the District Court was reversed. The Court of Appeals affirmed the judgment in favor of Anchor and the International. Saying that petitioners wanted to relitigate their discharges because of the recantation of the motel clerk, the Court of Appeals, quoting from its prior opinion in *Balowski* v. *International Union*, 372 F. 2d 829 (CA6 1967),[5] concluded that the finality provision of collective-bargaining contracts must be observed because there was "[n]o evidence of any misconduct on the part of the employer . . ." and wholly insufficient evidence of any conspiracy between the Union and Anchor. 506 F. 2d, at 1157, 1158.[6]

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pocketed the money; the claim of the union's failure to investigate the motel clerk's original story implicating plaintiffs despite their requests; the account of the union officials' assurances to plaintiffs that 'they had nothing to worry about' and 'that there was no need for them to investigate'; the contention that no exculpatory evidence was presented at the hearing; and the assertion that there existed political antagonism between local union officials and plaintiffs because of a wildcat strike led by some of the plaintiffs and a dispute over the appointment of a steward, resulting in denunciation of plaintiffs as 'hillbillies' by Angelo, the union president." 506 F. 2d 1153, 1156 (CA6 1974).

[5] The quoted segment of the opinion in *Balowski* v. *International Union*, 372 F. 2d, at 833, was:

"'It is apparent that what plaintiff is attempting to do is to relitigate his grievance in this proceeding. This he cannot do when the collective bargaining agreement provides for final and binding arbitration of all disputes, absent a showing of fraud, misrepresentation, bad faith, dishonesty of purpose, or such gross mistake or inaction as to imply bad faith on the part of the Union or the employer.'" 506 F. 2d, at 1157 (citation omitted).

The rule in the Sixth Circuit, under *Balowski*, would appear to have been that an employee could litigate his discharge in court if he proved bad faith or gross mistake on the part of *either* the union or the employer.

[6] One judge, otherwise concurring, dissented as to affirming summary judgment against Anchor because "issues of fact . . . pre-

It is this judgment of the Court of Appeals with respect to Anchor that is now before us on our limited grant of the employees' petition for writ of certiorari. 421 U. S. 928 (1975).[7] We reverse that judgment.

II

Section 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185, provides for suits in the district courts for violation of collective-bargaining contracts between labor organizations and employers without regard to the amount in controversy.[8] This provision reflects the interest of Congress in promoting "a higher degree of responsibility upon the parties to such agreements . . . ." S. Rep. No. 105, 80th Cong., 1st Sess.,

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sented by the pleadings concerning plaintiffs' charges against the employer . . . should not have been dealt with on summary judgment." 506 F. 2d, at 1158.

[7] Our order of April 21, 1975, was as follows:

"Certiorari granted limited to Question 1 presented by the petition which reads as follows:

"'1. Whether petitioners' claim under LMRA § 301 for wrongful discharge is barred by the decision of a joint grievance committee upholding their discharge, notwithstanding that their union breached its duty of fair representation in processing their grievance so as to deprive them and the grievance committee of overwhelming evidence of their innocence of the alleged dishonesty for which they were discharged?'"

The affirmance of summary judgment in favor of the International is therefore not before us. Nor is the judgment of the Court of Appeals reversing the summary judgment in favor of Local 377, since the Union has not sought review of this ruling.

[8] § 301 (a), 29 U. S. C. § 185 (a):

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

17 (1947). The strong policy favoring judicial enforcement of collective-bargaining contracts was sufficiently powerful to sustain the jurisdiction of the district courts over enforcement suits even though the conduct involved was arguably or would amount to an unfair labor practice within the jurisdiction of the National Labor Relations Board. *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962); *Atkinson* v. *Sinclair Rfg. Co.*, 370 U. S. 238 (1962); *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962); *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962). Section 301 contemplates suits by and against individual employees as well as between unions and employers; and contrary to earlier indications § 301 suits encompass those seeking to vindicate "uniquely personal" rights of employees such as wages, hours, overtime pay, and wrongful discharge. *Smith* v. *Evening News Assn.*, *supra*, at 198–200. Petitioners' present suit against the employer was for wrongful discharge and is the kind of case Congress provided for in § 301.

Collective-bargaining contracts, however, generally contain procedures for the settlement of disputes through mutual discussion and arbitration. These provisions are among those which are to be enforced under § 301. Furthermore, Congress has specified in § 203 (d), 61 Stat. 154, 29 U. S. C. § 173 (d), that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes . . . ." This congressional policy "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 566 (1960). Courts are not to usurp those functions which collective-bargaining contracts have properly "entrusted to the arbi-

tration tribunal." *Id.*, at 569. They should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes. Otherwise "plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593, 599 (1960).

Pursuant to this policy, we later held that an employee could not sidestep the grievance machinery provided in the contract and that unless he attempted to utilize the contractual procedures for settling his dispute with his employer, his independent suit against the employer in the District Court would be dismissed. *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965). *Maddox* nevertheless distinguished the situation where "the union refuses to press or only perfunctorily presses the individual's claim . . . . See *Humphrey* v. *Moore*, 375 U. S. 335; *Labor Board* v. *Miranda Fuel Co.*, 326 F. 2d 172." *Id.*, at 652 (footnote omitted).

The reservation in *Maddox* was well advised. The federal labor laws, in seeking to strengthen the bargaining position of the average worker in an industrial economy, provided for the selection of collective-bargaining agents with wide authority to negotiate and conclude collective-bargaining agreements on behalf of all employees in appropriate units, as well as to be the employee's agent in the enforcement and administration of the contract. Wages, hours, working conditions, seniority, and job security therefore became the business of certified or recognized bargaining agents, as did the contractual procedures for the processing and settling of grievances, including those with respect to discharge.

Necessarily "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serv-

ing the unit it represents . . . ." *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 338 (1953). The union's broad authority in negotiating and administering effective agreements is "undoubted," *Humphrey* v. *Moore,* 375 U. S. 335, 342 (1964), but it is not without limits. Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," *Vaca* v. *Sipes,* 386 U. S. 171, 182 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, "the responsibility and duty of fair representation." *Humphrey* v. *Moore, supra,* at 342. The union as the statutory representative of the employees is "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.* v. *Huffman, supra,* at 338. Since *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192 (1944), with respect to the railroad industry, and *Ford Motor Co.* v. *Huffman, supra,* and *Syres* v. *Oil Workers,* 350 U. S. 892 (1955), with respect to those industries reached by the National Labor Relations Act, the duty of fair representation has served as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca* v. *Sipes, supra,* at 182.

Claims of union breach of duty may arise during the life of a contract when individual employees claim wrongful discharge or other improper treatment at the hands of the employer. Contractual remedies, at least in their final stages controlled by union and employer, are normally provided; yet the union may refuse to utilize them or, if it does, assertedly may do so discriminatorily or in bad faith. "The problem then is to determine under

what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." *Vaca* v. *Sipes, supra,* at 185.

Humphrey v. *Moore, supra,* involved a seniority dispute between the employees of two transportation companies whose operating authorities had been combined. The employees accorded lesser seniority were being laid off. Their grievances were presented to the company and taken by the union to the joint arbitration committee pursuant to contractual provisions very similar to those now before us. The decision was adverse. The employees then brought suit in the state court against the company, the union, and the favored employees, asserting breach of contract by the company and breach of its duty of fair representation by the union. They sought damages and an injunction to prevent implementation of the decision of the joint arbitration committee. The union was charged with dishonest and bad-faith representation of the employees before the joint committee. The unions and the defendant employees asserted the finality of the joint committee's decision, if not as a final resolution of a dispute in the administration of a contract, as a bargained-for accommodation between the two parties. The state courts issued the injunction. Respondents argued here that "the decision of the Committee was obtained by dishonest union conduct in breach of its duty of fair representation and that a decision so obtained cannot be relied upon as a valid excuse for [their] discharge under the contract." 375 U. S., at 342. We reversed the judgment of the state court but only after independently determining that the union's conduct was not a breach of its statutory duties and that the joint committee's decision was not infirm for that reason. Our conclusion was that the disfavored employees had not

proved their case: "Neither the parties nor the Joint Committee exceeded their power under the contract and there was no fraud or breach of duty by the exclusive bargaining agent. The decision of the committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is." *Id.*, at 351.

In *Vaca* v. *Sipes, supra,* the discharged employee sued the union alleging breach of its duty of fair representation in that it had refused in bad faith to take the employee's grievance to arbitration as it could have under the contract. In the course of rejecting the claim that the alleged conduct was arguably an unfair practice within the exclusive jurisdiction of the Labor Board, we ruled that "the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." 386 U. S., at 186 (footnote omitted). This was true even though "the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies . . . ," for "the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process . . . were it not for the union's breach of its statutory duty of fair representation . . . ." *Id.*, at 185. We could not "believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract." *Id.*, at 186. Nor did we "think that Congress intended to shield employers from the natural consequences of their breaches of bar-

gaining agreements by wrongful union conduct in the enforcement of such agreements." *Ibid.* At the same time "we conclude[d] that a union does not breach its duty of fair representation . . . merely because it settled the grievance short of arbitration." *Id.*, at 192. "If the individual employee could compel arbitration of his grievance regardless of its merit," that is, compel both employers and unions to make full use of the contractual provisions for settling disputes by arbitration, "the settlement machinery provided by the contract would be substantially undermined," for curtailing the "power to settle the majority of grievances short of the costlier and more time-consuming steps" might deter the parties to collective-bargaining agreements from making "provi-[sion] for detailed grievance and arbitration procedures of the kind encouraged by L. M. R. A. § 203 (d)." *Id.*, at 191–192. We also expressly indicated that suit against the employer and suit against the union could be joined in one action. *Id.*, at 187.

III

Even though under *Vaca* the employer may not insist on exhaustion of grievance procedures when the union has breached its representation duty, it is urged that when the procedures have been followed and a decision favorable to the employer announced, the employer must be protected from relitigation by the express contractual provision declaring a decision to be final and binding. We disagree. The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract.

It is true that *Vaca* dealt with a refusal by the union

to process a grievance. It is also true that where the union actually utilizes the grievance and arbitration procedures on behalf of the employee, the focus is no longer on the reasons for the union's failure to act but on whether, contrary to the arbitrator's decision, the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings. But the judicial remedy in *Humphrey* v. *Moore* was sought after the adverse decision of the joint arbitration committee. Our conclusion in that case was not that the committee's decision was unreviewable. On the contrary, we proceeded on the basis that it was reviewable and vulnerable if tainted by breach of duty on the part of the union, even though the employer had not conspired with the union. The joint committee's decision was held binding on the complaining employees only after we determined that the union had not been guilty of malfeasance and that its conduct was within the range of acceptable performance by a collective-bargaining agent, a wholly unnecessary determination if the union's conduct was irrelevant to the finality of the arbitral process.[9]

In *Vaca* "we accept[ed] the proposition that a union

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[9] *Czosek* v. *O'Mara*, 397 U. S. 25 (1970), which arose under the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*, involved a claim that a railroad had wrongfully deprived plaintiff of his seniority and that the union had failed in its duty to protest. The suit against the union was sustained by the Court of Appeals, but dismissal of the claim against the railroad was affirmed absent allegation that the company had participated in the union's breach. In affirming the judgment we upheld the Court of Appeals' ruling against the union, but did not reach the question whether the railroad was properly dismissed over the employee's objections, since the latter did not challenge the judgment in this respect.

may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion," 386 U. S., at 191, and our ruling that the union had not breached its duty of fair representation in not pressing the employee's case to the last step of the grievance process stemmed from our evaluation of the manner in which the union had handled the grievance in its earlier stages. Although "the Union might well have breached its duty had it ignored [the employee's] complaint or had it processed the grievance in a perfunctory manner," "the Union conclude[d] both that arbitration would be fruitless and that the grievance should be dismissed" only after it had "processed the grievance into the fourth step, attempted to gather sufficient evidence to prove [the employee's] case, attempted to secure for [him] less vigorous work at the plant, and joined in the employer's efforts to have [him] rehabilitated." *Id.*, at 194.

Anchor would have it that petitioners are foreclosed from judicial relief unless some blameworthy conduct on its part disentitles it to rely on the finality rule. But it was Anchor that originated the discharges for dishonesty. If those charges were in error, Anchor has surely played its part in precipitating this dispute. Of course, both courts below held there were no facts suggesting that Anchor either knowingly or negligently relied on false evidence. As far as the record reveals it also prevailed before the joint committee after presenting its case in accordance with what were ostensibly wholly fair procedures. Nevertheless there remains the question whether the contractual protection against relitigating an arbitral decision binds employees who assert that the process has fundamentally malfunctioned by reason of the bad-faith performance of the union, their statutorily imposed collective-bargaining agent.

Under the rule announced by the Court of Appeals, unless the employer is implicated in the Union's malfeasance or has otherwise caused the arbitral process to err, petitioners would have no remedy against Anchor even though they are successful in proving the Union's bad faith, the falsity of the charges against them, and the breach of contract by Anchor by discharging without cause. This rule would apparently govern even in circumstances where it is shown that a union has manufactured the evidence and knows from the start that it is false; or even if, unbeknownst to the employer, the union has corrupted the arbitrator to the detriment of disfavored union members. As is the case where there has been a failure to exhaust, however, we cannot believe that Congress intended to foreclose the employee from his § 301 remedy otherwise available against the employer if the contractual processes have been seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct.

It is urged that the reversal of the Court of Appeals will undermine not only the finality rule but the entire collective-bargaining process. Employers, it is said, will be far less willing to give up their untrammeled right to discharge without cause and to agree to private settlement procedures. But the burden on employees will remain a substantial one, far too heavy in the opinion of some.[10] To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the

[10] Mr. Justice Black, for one, was of the view that where the union refused to process a grievance, the employee should be allowed his suit in court without proof of the union's breach of duty. *Vaca* v. *Sipes*, 386 U. S. 171, 203 (1967) (dissenting opinion).

Union. As the District Court indicated, this involves more than demonstrating mere errors in judgment.

Petitioners are not entitled to relitigate their discharge merely because they offer newly discovered evidence that the charges against them were false and that in fact they were fired without cause. The grievance processes cannot be expected to be error-free. The finality provision has sufficient force to surmount occasional instances of mistake. But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory; for in that event error and injustice of the grossest sort would multiply. The contractual system would then cease to qualify as an adequate mechanism to secure individual redress for damaging failure of the employer to abide by the contract. Congress has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity. In our view, enforcement of the finality provision where the arbitrator has erred is conditioned upon the union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings. Wrongfully discharged employees would be left without jobs and without a fair opportunity to secure an adequate remedy.

Except for this case the Courts of Appeals have arrived at similar conclusions.[11] As the Court of Appeals for the

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[11] *Steinman* v. *Spector Freight System, Inc.*, 441 F. 2d 599 (CA2 1971); *Butler* v. *Local Union 823, International Brotherhood of Teamsters*, 514 F. 2d 442 (CA8), cert. denied, 423 U. S. 924 (1975); *Margetta* v. *Pam Pam Corp.*, 501 F. 2d 179 (CA9 1974); *Local 13, International Longshoremen's & Warehousemen's Union*

Ninth Circuit put it in *Margetta* v. *Pam Pam Corp.*, 501 F. 2d 179, 180 (1974): "To us, it makes little difference whether the union subverts the arbitration process by refusing to proceed as in *Vaca* or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation."

Petitioners, if they prove an erroneous discharge and the Union's breach of duty tainting the decision of the joint committee, are entitled to an appropriate remedy against the employer as well as the Union. It was error to affirm the District Court's final dismissal of petitioners' action against Anchor. To this extent the judgment of the Court of Appeals is reversed.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, concurring.

I agree with the Court that proof of breach of the Union's duty of fair representation will remove the bar of finality from the arbitral decision that Anchor did not wrongfully discharge the petitioners. See *Vaca* v. *Sipes*, 386 U. S. 171, 194; *Humphrey* v. *Moore*, 375 U. S. 335, 348–351. But this is not to say that proof of breach of the Union's representation duty would render Anchor potentially liable for backpay accruing between the time of the "tainted" decision by the arbitration committee

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v. *Pacific Maritime Assn.*, 441 F. 2d 1061 (CA9 1971), cert. denied, 404 U. S. 1016 (1972). See also *Bieski* v. *Eastern Automobile Forwarding Co.*, 396 F. 2d 32, 38 (CA3 1968); *Rothlein* v. *Armour & Co.*, 391 F. 2d 574, 579–580 (CA3 1968); *Harris* v. *Chemical Leaman Tank Lines, Inc.*, 437 F. 2d 167, 171 (CA5 1971); *Andrus* v. *Convoy Co.*, 480 F. 2d 604, 606 (CA9), cert. denied, 414 U. S. 989 (1973).

and a subsequent "untainted" determination that the discharges were, after all, wrongful.

If an employer relies in good faith on a favorable arbitral decision, then his failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determination. Liability for the intervening wage loss must fall not on the employer but on the union. Such an apportionment of damages is mandated by *Vaca*'s holding that "damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." 386 U. S., at 197–198. To hold an employer liable for back wages for the period during which he rightfully refuses to rehire discharged employees would be to charge him with a contractual violation on the basis of conduct precisely in accord with the dictates of the collective agreement.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Petitioners seek $1 million damages from their employer and their union on the grounds that they were wrongfully discharged from their jobs. The District Court granted summary judgment for respondents, finding that the issues had been finally decided as to respondent Anchor Motor by the arbitration committee and that petitioners had failed "to show facts comprising bad faith, arbitrariness or perfunctoriness on the part of the Unions." The Court of Appeals reversed the summary judgment as to the local Union, holding that the issue of bad faith should not have been summarily decided. However, as to respondent Anchor Motor the Court of Appeals affirmed, holding that where, as here, the collective-bargaining agreement provided that arbitra-

tion would be final and binding, the decision of the arbitrator would not be upset, "absent a showing of fraud, misrepresentation, bad faith, dishonesty of purpose, or such gross mistake or inaction as to imply bad faith on the part of the Union or the employer." 506 F. 2d 1153, 1157 (1974). This Court, assuming *arguendo* that the Union breached its duty of fair representation for the reasons set forth in the opinion, reverses as to Anchor Motor, holding that the *Union's* breach of its duty to its members voided an otherwise valid arbitration decision in favor of the *company*. I find this result to be anomalous and contrary to the longstanding policy of this Court favoring the finality of arbitration awards.

In *Vaca* v. *Sipes*, 386 U. S. 171 (1967), this Court held that, where the union has prevented the employee from taking his grievance to arbitration, as provided in the collective-bargaining agreement, he may then turn to the courts for relief. This decision bolstered the consistent policy of this Court of encouraging the parties to settle their differences according to the terms of their collective-bargaining agreement. *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 566 (1960). By subjecting the employer to a damages suit due to the union's failure to utilize the arbitration process on behalf of the employees, the *Vaca* decision put pressure on both employers and unions to make full use of the contractual provisions for settling disputes by arbitration.

The decision in this case will have the exact opposite result. Here the Court has cast aside the policy of finality of arbitration decisions and established a new policy of encouraging challenges to arbitration decrees by the losing party on the ground that he was not properly represented.

The majority cites *Margetta* v. *Pam Pam Corp.*, 501 F. 2d 179, 180 (CA9 1974), for the proposition that "it

makes little difference whether the union subverts the arbitration process by refusing to proceed as in *Vaca* or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee." *Ante*, at 572. To the contrary, I believe that the existence of a final arbitration decision is the crucial difference between this case and *Vaca*. The duty of "fair representation" discussed in *Vaca* was the duty of the union to put the case to a fair and neutral arbitrator, a step which the employee could not take by himself. 386 U. S., at 185.

Here the case *was* presented to a concededly fair and neutral arbitrator but the claim is that that arbitration decision should be vacated because the employee did not receive "fair representation" from the Union in the sense of representation by counsel at a trial. Obviously this stretches *Vaca* far beyond its original meaning and adopts the novel notion that one may vacate an otherwise valid arbitration award because his "counsel" was ineffective.

As noted, such a principle violates this Court's policy favoring the finality of arbitration awards. It also has no basis in the statutory provisions respecting arbitration. Section 12 of the Uniform Arbitration Act, which is in use in many States, sets forth the grounds for vacating an award. These include awards having been procured by corruption or fraud, and arbitrators' exceeding their powers or exhibiting evident partiality. The federal statute governing arbitration, 9 U. S. C. §§ 1–14, provides similarly narrow grounds for vacating an award. § 10. Nowhere is any provision made for vacation of an award due to ineffective presentation of the case by a party's attorney or representative.

The Court's decision is particularly vexing on the facts of this case. Petitioners had at their own disposal

all of the information necessary to present their case. If they had felt that the Union had not brought this information fully to the attention of the arbitration committee or that further investigation was necessary they could have so informed the committee. There is no indication that they did so. Rather, they allowed, without protest, the arbitration to proceed to a decision and when that decision was adverse they brought suit against the company and the Union.

Now the employer, which concededly acted in good faith throughout these proceedings, is to be subjected to a damages suit because of the Union's alleged misconduct. In view of the fact that petitioners have an action for damages against the Union, see *Czosek* v. *O'Mara*, 397 U. S. 25 (1970), this additional remedy against the employer seems both undesirable and unnecessary.

For the reasons stated I would affirm the judgment of the Court of Appeals.

LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* MILNE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 74–1137. Argued December 2, 1975—Decided March 3, 1976

A New York welfare statute disqualifies from the receipt of Home Relief benefits for 75 days anyone who voluntarily terminates his employment or reduces his earning capacity for the purpose of qualifying for benefits, and further provides, by way of a "rebuttable presumption," that a person who applies for assistance within 75 days after so voluntarily terminating his employment or reducing his earning capacity shall be "deemed" to have done so "for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person." In this action challenging the constitutionality of the latter provision, a three-judge District Court held the provision to be violative of due process. *Held:* The "rebuttable presumption" provision does not deny due process of law under the Fourteenth Amendment. Pp. 582–587.

(a) The provision's sole purpose is to indicate that, as with other eligibility requirements, the applicant rather than the State must establish that he did not leave employment for the purpose of qualifying for benefits, and the only "rebuttable presumption," if it can be so called, is the normal assumption that an applicant is not entitled to benefits unless and until he proves his eligibility. Pp. 583–585.

(b) The fact that under the prescribed procedure a decision, even one favorable to an applicant, ensuing from a hearing at which the applicant may appeal an adverse decision by the local welfare official need not be handed down until 90 days from the date the hearing was requested, thus extending beyond the 75-day waiting period, does not render such hearing procedure meaningless. The procedure for ascertaining the applicant's purpose in quitting his job is no different from the procedure for determining any of the other substantive requirements for welfare eligibility, and nothing in the Constitution requires that benefits be initiated prior to the determination of an applicant's qualifica-

tions at an adjudicatory hearing. Even if an inordinately large number of applicants are initially denied benefits incorrectly because of a false evaluation of their motives in resigning jobs, the constitutionality of the procedure is not placed in doubt, since the Fourteenth Amendment does not guarantee that all state officials' decisions will be correct, and New York would seem to have no incentive to deny benefits wrongfully. Pp. 586–587.

(c) Even if the benefits are so small no one would be tempted to leave a job to receive them and the practical difficulty of proving one's state of mind may frequently lead to incorrect denial of benefits, and even assuming, *arguendo*, that the burden of the "rebuttable presumption" provision on the industrious indigent far outweighs any conceivable gain to the State from screening out the indolent few, New York nevertheless prefers its chosen course, and it is not for this Court to assay the wisdom of that determination. P. 587.

384 F. Supp. 206, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which all Members joined except STEVENS, J., who took no part in the consideration or decision of the case.

Amy Juviler, Assistant Attorney General of New York, argued the cause for appellant. With her on the briefs were *Louis J. Lefkowitz,* Attorney General, and *Samuel A. Hirshowitz,* First Assistant Attorney General.

Gerald A. Norlander argued the cause for appellees *pro hac vice.* With him on the brief was *Martin A. Schwartz.*

MR. JUSTICE WHITE delivered the opinion of the Court.

A New York welfare statute, N. Y. Soc. Serv. Law § 131 (11) (Supp. 1975),[1] disqualifies from receipt of

[1] This law was formerly numbered N. Y. Soc. Serv. Law § 131 (10) (Supp. 1973). The law was renumbered without change in language by a 1974 amendment to the New York Social Services Law, N. Y. Laws 1974, c. 621, § 2.

welfare for 75 days anyone who voluntarily terminates his employment or reduces his earning capacity for the purpose of qualifying for Home Relief or Aid to Families with Dependent Children. A further provision—that at issue in this case—states that a person who applies for assistance within 75 days after voluntarily terminating his employment or reducing his earning capacity shall be "deemed" to have done so "for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person." The question raised by this appeal from the judgment of a three-judge court is whether this "presumption" denies due process of law.

Appellee Milne and the appellee intervenors are all applicants for New York Home Relief—a residual category of aid for needy individuals unable to qualify for other types of state or federal relief.[2] In addition to meeting substantive financial eligibility requirements, see, *e. g.*, 18 NYCRR §§ 352.27, 352.28, Home Relief applicants must meet the requirements of N. Y. Soc. Serv. Law § 131 (11) (Supp. 1975) and 18 NYCRR § 385.7 promulgated pursuant thereto. Section 131 (11) provides:

> "Any person who voluntarily terminated his employment or voluntarily reduced his earning capacity for the purpose of qualifying for home relief or aid to dependent children or a larger amount thereof shall be disqualified from receiving such assistance for seventy-five days from such termination or reduction, unless otherwise required by federal law or

[2] See N. Y. Soc. Serv. Law § 158 (a) (Supp. 1975), which provides in part:

"Any person unable to provide for himself, or who is unable to secure support from a legally responsible relative, who is not receiving needed assistance or care under other provisions of this chapter, or from other sources, shall be eligible for home relief."

regulation. Any person who applies for home relief or aid to dependent children or requests an increase in his grant within seventy-five days after voluntarily terminating his employment or reducing his earning capacity shall, unless otherwise required by federal law or regulation, be deemed to have voluntarily terminated his employment or reduced his earning capacity for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person." [3]

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[3] Title 18 NYCRR § 385.7 provides:

"(a) A person who: (1) voluntarily terminates employment or reduces his earning capacity for the purpose of qualifying for assistance or a larger amount thereof; or (2) without good cause fails or refuses to undergo a necessary medical examination or treatment; or (3) is required under this Part to receive manpower services and certification and without good cause fails or refuses to accept manpower services and certification; or (4) is required under this Part to pick up his check semi-monthly at the State Employment Service and without good cause fails or refuses to do so; or (5) without good cause fails or refuses to accept referral to and participate in a vocational rehabilitation program,

"shall be disqualified from receiving assistance for 30 days thereafter and until such time as he is willing to comply with the requirements of this Part, except that an applicant for or recipient of HR who voluntarily terminated employment or reduced his earning capacity shall be disqualified from receiving assistance for 75 days thereafter and until such time as he is willing to comply with the requirements of this Part.

"(b) Any person who applies for HR or requests an increase in his grant, within 75 days after voluntarily terminating employment or reducing his earning capacity or similarly within 30 days for ADC, shall be deemed to have voluntarily terminated employment or reduced his earning capacity for the purpose of qualifying for such or larger amount thereof in the absence of evidence to the contrary supplied by such person.

"(c) In the event a person is subject at the same time to the requirements of this Part and the requirements of the WIN program,

Each of the appellees was denied relief on the ground that his voluntary cessation of employment was "for the purpose of qualifying" for Home Relief; each was therefore barred from receiving aid for 75 days.

Contending that this statute and regulation violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, appellee Milne brought a class suit in the District Court seeking declaratory and injunctive relief and damages against the Commissioner of the New York State Department of Social Services and the Commissioner of the Westchester County Department of Social Services. Jurisdiction was predicated upon 28 U. S. C. § 1343 (3) and 42 U. S. C. § 1983. Since appellees sought an injunction against the enforcement of a state statute on the ground of its unconstitutionality, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281, 2284.

Upon cross-motions for summary judgment the three-judge court certified the class and held that the second sentence of § 131 (11) and the supporting provision of 18 NYCRR § 385.7 were unconstitutional.[4] Injunctive relief followed.[5] The court found that § 131 (11) cre-

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the requirements of the WIN program shall take priority, and where a sanction is required to be imposed against a person under this Part and the WIN requirements, the WIN sanction shall be imposed."

[4] The opinion below is reported *sub nom. Milne* v. *Berman,* 384 F. Supp. 206 (SDNY 1974) (three-judge court).

[5] The Court remanded the question of damages to the single-judge court. *Id.,* at 213 n. 8.

The court below enjoined enforcement of § 131 (11) and 18 NYCRR § 385.7 with respect not only to Home Relief applicants, but also to applicants for Aid to Families with Dependent Children, despite the fact that no applicants for AFDC were before the court. Both appellant and appellees agree, though for different reasons, that the court below erred in adjudicating the constitutionality of the presumption as applied to AFDC applicants. Our disposition of this case obviates any need to pass on this issue.

ated a "rebuttable presumption" that an applicant who voluntarily terminated his employment did so for a wrongful purpose. Relying upon decisions of this Court holding that presumptions are permissible unless they are unreasonable, arbitrary, or invidiously discriminatory, see, *e. g., Bandini Petroleum Co.* v. *Superior Court,* 284 U. S. 8 (1931); *Leary* v. *United States,* 395 U. S. 6 (1969); *Tot* v. *United States,* 319 U. S. 463 (1943), the court held the rebuttable presumption irrational in violation of the Due Process Clause. "[T]here is an insufficient connection between the known fact, that is, application for public assistance within 75 days of an applicant's termination of employment, and the fact presumed by the statute, that is, that the applicant terminated his employment for the purpose of qualifying for public assistance." [6] First, it found that the limits of relief were so low that no substantial number of people would leave work merely to obtain welfare benefits. Second, it determined that the poor have "the same desire to work and to obtain the fruits of work as the non-poor." Although the court recognized that the presumption could be rebutted, it found that the fair-hearing procedure of New York took so long—frequently in excess of 75 days—that it was "meaningless" in that even a determination favorable to the applicant would usually come after the 75-day penalty period had passed.

Appellant Lavine, the Commissioner of the New York State Department of Social Services, appealed pursuant to 28 U. S. C. § 1253, and we noted probable jurisdiction, 422 U. S. 1054 (1975). We reverse.

As with any other welfare scheme, New York Home Relief imposes a host of requirements; and as is the case when applying for most governmental benefits, applicants for Home Relief bear the burden of showing their eligibil-

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[6] 384 F. Supp., at 210.

ity in all respects. See, *e. g.*, 18 NYCRR §§ 351.1 (b) (2)ii, 351.6, 351.8, and 370.4 (a).[7] An applicant may not earn income or hold assets that exceed minimal levels. See 18 NYCRR §§ 352.16, 352.22, 352.28. He may be required in certain circumstances to dispose of any equity in his house, N. Y. Soc. Serv. Law §§ 104, 360 (1966 and Supp. 1975); 18 NYCRR § 352.27, or to sell his automobile, 18 NYCRR §§ 352.15 (d), 352.28 (b). If assistance is initially denied, the applicant may reapply on the basis of new evidence or may invoke his right to have his eligibility reviewed in a full administrative hearing. 18 NYCRR §§ 358.4–358.5. To the requirements found elsewhere in the New York welfare statutes and regulations, the first sentence of § 131 (11) imposes an additional qualification: applicants who voluntarily terminate their employment with the purpose of obtaining Home Relief are ineligible to receive such benefits for 75 days. No challenge to this provision was raised or entertained in the court below.[8]

The second sentence of § 131 (11), at issue here, provides that a person who applies for benefits within 75 days after the voluntary cessation of his employment is "deemed" to have quit "for the purpose of qualifying" for benefits, "in the absence of evidence to the contrary supplied by such person." Although the District Court found this to be an unconstitutional "rebuttable presumption," the sole purpose of the provision is to indicate that, as with other eligibility requirements, the applicant rather than the State must establish that he did not leave employment for the purpose of qualifying

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[7] Section 370.4 (a), *e. g.*, provides in part that:

"Insofar as practicable, responsibility shall be placed upon the applicant for home relief to provide verified information concerning his previous maintenance, loss of income and the extent and duration of current need."

[8] See n. 9, *infra*.

for benefits. The provision carries with it no procedural consequence; it shifts to the applicant neither the burden of going forward nor the burden of proof, for he appears to carry the burden from the outset.

The offending sentence could be interpreted as a rather circumlocutory direction to welfare authorities to employ a standardized inference that if the Home Relief applicant supplies no information on the issue, he will be presumed to have quit his job to obtain welfare benefits. However, such an instruction would be superfluous for the obvious reason that the failure of an applicant to prove an essential element of eligibility will always result in the denial of benefits, much as the failure of a tort or contract plaintiff to prove an essential element of his case will always result in a nonsuit. The only "rebuttable presumption"—if, indeed, it can be so called—at work here is the normal assumption that an applicant is not entitled to benefits unless and until he proves his eligibility.

Despite the rebuttable presumption aura that the second sentence of § 131 (11) radiates, it merely makes absolutely clear the fact that the applicant bears the burden of proof on this issue, as he does on all others. And since appellees do not object to the substantive requirement that Home Relief applicants must be free of the impermissible benefit-seeking motive,[9] their underly-

[9] Nor could the constitutionality of this substantive requirement be seriously questioned. Welfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support. *Dandridge* v. *Williams*, 397 U. S. 471 (1970). A provision denying benefits to those who quit their jobs to obtain relief is a perfectly legitimate and reasonable legislative response to the risk that the availability of welfare benefits might undermine the incentive to work.

Since nothing is conclusively presumed against the applicant, who

ing complaint may be that the burden of proof on this issue has been unfairly placed on welfare applicants rather than on the State.

Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application. It may be that establishing the absence of an illicit motive—as § 131 (11) requires appellees to do—is difficult, although as appellant argues, an applicant's motive should be best known by the applicant himself. However that may be, it is not for us to resolve the question of where the burden ought to lie on this issue. Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.[10]

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is clearly required to prove his eligibility if he is to receive relief, this Court's prior cases dealing with so-called irrebuttable presumptions are not in point. See, *e. g., United States Department of Agriculture* v. *Murry,* 413 U. S. 508 (1973); *Vlandis* v. *Kline,* 412 U. S. 441 (1973).

Also wide of the mark are those cases such as *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, 644 (1929), which invalidated statutory "rebuttable presumptions" in the civil area for lack of rational connection between the ultimate fact presumed and the fact actually placed in evidence. Without examining whether such cases would today be decided as they were, it is evident that they involved easing the burden of proof of one party or shifting it to another. Here, as we have said, no easing or shifting takes place. Section 131 (11) places and leaves the burden of proof on the applicant from the outset.

[10] The cases from the criminal law relied on by the District Court, see, *e. g., Leary* v. *United States,* 395 U. S. 6 (1969); *Tot* v. *United States,* 319 U. S. 463 (1943), are not in point; they reflect the standard rule that the State *does* bear the burden of proving criminal guilt, *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975); *In re Winship,* 397 U. S. 358 (1970), and that statutory presumptions aimed at assisting in that burden must satisfy certain standards of reliability indicated in the cases. See, *e. g., Turner* v. *United States,* 396 U. S.

In both their brief and during oral argument, appellees made much of the fact that their only real opportunity to rebut the "presumption" comes at a hearing the decision of which need not be handed down until 90 days from the date the hearing was requested by the applicant. See 18 NYCRR § 358.18. Because even a decision favorable to the applicant may be issued more than 15 days after the end of the 75-day waiting period when the applicant's motive in quitting his job is no longer relevant, appellees claim the hearing procedure is meaningless. Thus, they contend that a hearing must be held prior to the imposition of the 75-day "sanction." Brief for Appellees 96. There are at least two answers to their contention.

First, the State's procedure in ascertaining the applicant's purpose in quitting his job is no different from its procedure in determining any of the other substantive requirements for eligibility. An applicant visits the local agency, is informed of the eligibility criteria, and in response to questions posited by the local official is afforded an opportunity to demonstrate his eligibility. 18 NYCRR § 351.1. The answers to these questions determine whether the applicant receives Home Relief. If an adverse determination is made, the applicant has the right to appeal and to receive a full hearing. 18 NYCRR §§ 358.4, 358.5. Certainly nothing in the Constitution requires that benefits be initiated prior to the determination of an applicant's qualifications at an adjudicatory hearing. Second, even if it is true that an inordinately large number of Home Relief applicants are initially denied benefits incorrectly because of a false evaluation of their motives in resigning jobs, this in no

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398 (1970). These cases are not helpful where the burden is, as it may be, placed on the applicant for Home Relief.

way places in doubt the constitutionality of the application procedure. The Fourteenth Amendment does not guarantee that all decisions by state officials will be correct, and New York would seem to have no incentive to deny benefits wrongfully. If on appeal the initial decision to deny benefits is overturned, payments retroactive to the date of application appear to be required. 18 NYCRR § 351.8. Each wrongful decision that is successfully appealed gains the State no substantive advantage and, indeed, costs the State by way of procedural waste.

Appellees cite much data that suggest that the poor no more than the wealthy quit jobs to obtain welfare benefits. Their argument that Home Relief benefits are so small—about $3.10 per day,[11] not including shelter allowance[12]—that no one would be tempted to leave a job to receive them has force. It is also asserted that the practical difficulty in satisfactorily proving one's state of mind frequently leads to the incorrect denial of benefits to qualified individuals. Even so, and even assuming, *arguendo*, that the burden of § 131 (11) on the industrious indigent far outweighs any conceivable gain to the State from screening out the indolent few, New York nevertheless prefers its chosen course; and it is not for this Court to assay the wisdom of that determination. The purpose of § 131 (11) is permissible, and the procedure for fulfilling that purpose, far from being unconstitutional, is one conventionally applied to applicants for governmental benefits.

For the reasons stated herein, the judgment of the

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[11] N. Y. Soc. Serv. Law § 131-a (Supp. 1975).

[12] Shelter allowances are provided on an "as paid" basis, up to maximums established in each welfare district. See 18 NYCRR § 352.3.

District Court is reversed, and the case is remanded for proceedings consistent with this opinion.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

RISTAINO ET AL. *v.* ROSS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 74–1216. Argued December 8–9, 1975—Decided March 3, 1976

Absent circumstances comparable in significance to those existing in *Ham* v. *South Carolina*, 409 U. S. 524, examination of veniremen during *voir dire* about racial prejudice is *held* not constitutionally required. In the instant case, which involved the prosecution of respondent, a Negro, for violent crimes against a white security guard, respondent did not show such circumstances. There was thus no error of constitutional dimensions when the state trial judge questioned veniremen about general bias or prejudice but declined to question them specifically about racial prejudice. Pp. 594–598.

508 F. 2d 754, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. WHITE, J., filed a statement concurring in the result, *post*, p. 598. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 599. STEVENS, J., took no part in the consideration or decision of the case.

Barbara A. H. Smith, Assistant Attorney General of Massachusetts, argued the cause for petitioners. With her on the briefs were *Francis X. Bellotti*, Attorney General, *John J. Irwin, Jr.*, and *David A. Mills*, Assistant Attorneys General.

Michael G. West, by appointment of the Court, 421 U. S. 1009, argued the cause and filed a brief for respondent.

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondent is a Negro convicted in a state court of violent crimes against a white security guard. The trial

judge denied respondent's motion that a question specifically directed to racial prejudice be asked during *voir dire* in addition to customary questions directed to general bias or prejudice. The narrow issue is whether, under our recent decision in *Ham* v. *South Carolina*, 409 U. S. 524 (1973), respondent was constitutionally entitled to require the asking of a question specifically directed to racial prejudice. The broader issue presented is whether *Ham* announced a requirement applicable whenever there may be a confrontation in a criminal trial between persons of different races or different ethnic origins. We answer both of these questions in the negative.

I

Respondent, James Ross, Jr., was tried in a Massachusetts court with two other Negroes for armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. The victim of the alleged crimes was a white man employed by Boston University as a uniformed security guard. The *voir dire* of prospective jurors was to be conducted by the court, which was required by statute to inquire generally into prejudice. See n. 3, *infra*. Each defendant, represented by separate counsel, made a written motion that the prospective jurors also be questioned specifically about racial prejudice.[1] Each defendant also moved that the veniremen be asked about affiliations with law enforcement agencies.

The trial judge consulted counsel for the defendants about their motions. After tentatively indicating that

[1] The question proposed by Ross, who did not adopt as his own various other questions proposed by his codefendants, was: "5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" App. 23.

he "[felt] that no purpose would be accomplished by asking such questions in this instance," the judge invited the views of counsel:

> "THE COURT: . . . I thought from something Mr. Donnelly [counsel for a codefendant] said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court.
>
> "Is there anything peculiar about it, Mr. Donnelly?
>
> "MR. DONNELLY: No, just the fact that the victim is white, and the defendants are black.
>
> "THE COURT: This, unfortunately, is a problem with us, and all we can hope and pray for is that the jurors and all of them take their oaths seriously and understand the spirit of their oath and understand the spirit of what the Court says to them—this Judge anyway—and I am sure all Judges of this Court—would take the time to impress upon them before, during, and after the trial, and before their verdict, that their oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations.
>
> "I believe that that is the best that can be done with respect to the problems which—as I said, I regard as extremely important . . . ." App. 29–30.

Further discussion persuaded the judge that a question about law enforcement affiliations should be asked because of the victim's status as a security guard.[2] But

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[2] "MR. DONNELLY: There is only one thing. The only reference I would make to the facts in this case—the victim[']s being white, and that he was a security guard in uniform and acting as a policeman.

"MR. NEWMAN [counsel for Ross]: I think that factor might

he adhered to his decision not to pose a question directed specifically to racial prejudice.

The *voir dire* of five panels of prospective jurors then commenced. The trial judge briefly familiarized each panel with the facts of the case, omitting any reference to racial matters. He then explained to the panel that the clerk would ask a general question about impartiality and a question about affiliations with law enforcement agencies.[3] Consistently with his announced intention to "impress upon [the jurors] . . . that they are to decide the case on the evidence, with no extraneous considerations," the judge preceded the questioning of the panel with an extended discussion of the obligations of jurors.[4]

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suggest the question—this was my series of questions—asking the jurors whether any of their relatives are policemen.

. . . . . .

"THE COURT: I am going to adopt Mr. Newman's suggestion that we have a double problem here, not only the problem of skin color, but we also have the problem of someone who is a quasi policeman, so I am going to ask . . . [a question] in the area of relations to police . . . ." *Id.*, at 30–31.

[3] The questions were, in substance, the following:

"If any of you are related to the defendants or to the victim, or if any of you have any interest in this case, or have formed an opinion or is sensible of any bias or prejudice, you should make it known to the court at this time.

. . . . . .

"... Are you presently, or have you in the past worked for a police department or a district attorney's office, or do you have any relative who is or was engaged in such work." *Id.*, at 71.

The first question was required by Mass. Gen. Laws Ann., c. 234, § 28 (1959).

[4] He addressed one panel in part as follows:

"[THE COURT:] ... [U]nder your oath, you have an absolute duty to render a fair and impartial verdicts [*sic*] based upon the evidence that you hear in the courtroom, and no extraneous factors.

"The Clerk in asking you the first question is giving you an opportunity to inform the Court, if you believe that you cannot

After these remarks the clerk posed the questions indicated to the panel. Panelists answering a question affirmatively were questioned individually at the bench by the judge, in the presence of counsel. This procedure led to the excusing of 18 veniremen for cause on grounds of prejudice, including one panelist who admitted a racial bias.[5]

The jury eventually impaneled convicted each defendant of all counts. On direct appeal Ross contended that his federal constitutional rights were violated by the denial of his request that prospective jurors be questioned specifically about racial prejudice. This contention was rejected by the Supreme Judicial Court of Massachusetts, *Commonwealth* v. *Ross,* 361 Mass. 665, 282 N. E. 2d 70 (1972), and Ross sought a writ of certiorari. While his petition was pending, we held in *Ham* that a trial court's failure on request to question veniremen specifically about racial prejudice had denied Ham due process

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render a fair and impartial verdict on the evidence in this case; giving you an opportunity to inform the Court if you have serious doubt as to whether you can render a fair and impartial verdict on the evidence in the case.

"Under this question, and under your oath, when this question is asked, if you believe that you cannot render a fair and impartial verdict on the evidence in this case, or if you have a doubt as to whether you can so render a fair and impartial verdict on the evidence in the case, you have a duty to inform the Court when that question is asked by standing or raising your hand." App. 72.

[5] At least this venireman knew that the defendants were Negroes. See *id.,* at 42. He was a member of the first panel questioned, and the record shows that immediately before the questioning of that panel the defendants were directed to stand and were "set at the bar to be tried." *Id.,* at 39. It appears that this formality was pursued only before the questioning of the first panel. Cf. *id.,* at 49–50, 73–74, 84, 97. Nothing in the record lodged in this Court indicates whether the veniremen from other panels knew that the defendants were Negroes, although presumably the defendants remained in the courtroom throughout the questioning.

of law. We granted Ross' petition for certiorari and remanded for reconsideration in light of *Ham*, 410 U. S. 901 (1973); the Supreme Judicial Court again affirmed Ross' conviction. *Commonwealth* v. *Ross*, 363 Mass. 665, 296 N. E. 2d 810 (1973). The court reasoned that *Ham* turned on the need for questions about racial prejudice presented by its facts and did not announce "a new broad constitutional principle requiring that [such] questions . . . be put to prospective jurors in all State criminal trials when the defendant is black. . . ." *Id.*, at 671, 296 N. E. 2d, at 815. Ross again sought certiorari, but the writ was denied. 414 U. S. 1080 (1973).

In the present case Ross renewed his contention on collateral attack in federal habeas corpus. Relying on *Ham*, the District Court granted a writ of habeas corpus, and the Court of Appeals for the First Circuit affirmed. 508 F. 2d 754 (1974). The Court of Appeals assumed that *Ham* turned on its facts. But it held that the facts of Ross' case, involving "violence against a white" with "a status close to that of a police officer," presented a need for specific questioning about racial prejudice similar to that in *Ham*. *Id.*, at 756. We think the Court of Appeals read *Ham* too broadly.

II

The Constitution does not always entitle a defendant to have questions posed during *voir dire* specifically directed to matters that conceivably might prejudice veniremen against him. *Ham, supra*, at 527–528. *Voir dire* "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." *Connors* v. *United States*, 158 U. S. 408, 413 (1895); see *Ham, supra*, at 527–528; *Aldridge* v. *United States*, 283 U. S. 308, 310 (1931). This is so because

the "determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." *Rideau* v. *Louisiana*, 373 U. S. 723, 733 (1963) (Clark, J., dissenting). Thus, the State's obligation to the defendant to impanel an impartial jury [6] generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant. *Ham*, *supra*, at 527–528.

In *Ham*, however, we recognized that some cases may present circumstances in which an impermissible threat to the fair trial guaranteed by due process is posed by a trial court's refusal to question prospective jurors specifically about racial prejudice during *voir dire*. *Ham* involved a Negro tried in South Carolina courts for possession of marihuana. He was well known in the locale of his trial as a civil rights activist, and his defense was that law enforcement officials had framed him on the narcotics charge to "get him" for those activities. Despite the circumstances, the trial judge denied Ham's request that the court-conducted *voir dire* include questions specifically directed to racial prejudice.[7] We reversed the judgment of conviction because "the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the [defendant] be permitted to have the

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[6] A criminal defendant in a state court is guaranteed an "impartial jury" by the Sixth Amendment as applicable to the States through the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U. S. 145 (1968). Principles of due process also guarantee a defendant an impartial jury. See, *e. g.*, *Irvin* v. *Dowd*, 366 U. S. 717, 722 (1961).

[7] The questions proposed by Ham were:

"1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?

"2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?" 409 U. S., at 525 n. 2.

jurors interrogated [during *voir dire*] on the issue of racial bias." 409 U. S., at 527.

By its terms *Ham* did not announce a requirement of universal applicability.[8] Rather, it reflected an assessment of whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as "indifferent as [they stand] unsworne." Coke on Littleton 155b (19th ed. 1832). In this approach *Ham* was consistent with other determinations by this Court that a State had denied a defendant due process by failing to impanel an impartial jury. See *Irvin* v. *Dowd*, 366 U. S. 717 (1961); *Rideau* v. *Louisiana*, *supra*; *Turner* v. *Louisiana*, 379 U. S. 466 (1965); cf. *Avery* v. *Georgia*, 345 U. S. 559 (1953).

The circumstances in *Ham* strongly suggested the need for *voir dire* to include specific questioning about racial prejudice. Ham's defense was that he had been framed because of his civil rights activities. His prom-

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[8] In defending the judgment of the Court of Appeals Ross argues for a sweeping *per se* rule. At least where crimes of violence are involved, he would require defense motions for *voir dire* on racial prejudice to be granted in any case where the defendant was of a different race from the victim. He would require a similar result whenever any defendant sought *voir dire* on racial prejudice because of the race of his own or adverse witnesses. Tr. of Oral Arg. 29–34. We note that such a *per se* rule could not, in principle, be limited to cases involving possible racial prejudice. It would apply with equal force whenever *voir dire* questioning about ethnic origins was sought, and its logic could encompass questions concerning other factors, such as religious affiliation or national origin. See *Aldridge* v. *United States*, 283 U. S. 308, 313 (1931). In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion. See *Connors* v. *United States*, 158 U. S. 408, 415 (1895).

inence in the community as a civil rights activist, if not already known to veniremen, inevitably would have been revealed to the members of the jury in the course of his presentation of that defense. Racial issues therefore were inextricably bound up with the conduct of the trial. Further, Ham's reputation as a civil rights activist and the defense he interposed were likely to intensify any prejudice that individual members of the jury might harbor. In such circumstances we deemed a *voir dire* that included questioning specifically directed to racial prejudice, when sought by Ham, necessary to meet the constitutional requirement that an impartial jury be impaneled.

We do not agree with the Court of Appeals that the need to question veniremen specifically about racial prejudice also rose to constitutional dimensions in this case.[9] The mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham*. The victim's status as a security officer, also relied upon by the Court of Appeals, was cited by respective defense counsel primarily as a separate source of prejudice, not as an aggravating racial factor,

[9] Although we hold that *voir dire* questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant. Under our supervisory power we would have required as much of a federal court faced with the circumstances here. See *Aldridge* v. *United States*, *supra*; cf. *United States* v. *Walker*, 491 F. 2d 236 (CA9), cert. denied, 416 U. S. 990 (1974); *United States* v. *Booker*, 480 F. 2d 1310 (CA7 1973). The States also are free to allow or require questions not demanded by the Constitution. In fact, the Supreme Judicial Court of Massachusetts has suggested guidelines to Massachusetts trial courts for questioning about racial prejudice on *voir dire*. *Commonwealth* v. *Lumley*, — Mass. —, 327 N. E. 2d 683 (1975); *Commonwealth* v. *Ross*, 363 Mass. 665, 673, 296 N. E. 2d 810, 816 (1973).

see n. 2, *supra*, and the trial judge dealt with it by his question about law-enforcement affiliations.[10] The circumstances thus did not suggest a significant likelihood that racial prejudice might infect Ross' trial. This was made clear to the trial judge when Ross was unable to support his motion concerning *voir dire* by pointing to racial factors such as existed in *Ham* or others of comparable significance. In these circumstances, the trial judge acted within the Constitution in determining that the demands of due process could be satisfied by his more generalized but thorough inquiry into the impartiality of the veniremen. Accordingly, the judgment is

Reversed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE WHITE concurs in the result on the ground that *Ham* v. *South Carolina*, 409 U. S. 524 (1973), announced a new constitutional rule applicable to federal and state criminal trials and that this rule should not be applied retroactively to cases such as this involving trials which occurred prior to the decision in *Ham*.

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[10] The facts here resemble in many respects those in *Aldridge*, *supra*, where the Court overturned the conviction of a Negro for the murder of a white policeman because the federal trial judge had refused the defendant's request that the venire be questioned about racial prejudice. *Ham* relied in part on *Aldridge* in finding that the inquiry into racial prejudice on *voir dire* sought in *Ham* had "constitutional stature." 409 U. S., at 528. While *Aldridge* was one factor relevant to the constitutional decision in *Ham*, we did not rely directly on its precedential force. Rather, we noted that *Aldridge* "was not expressly grounded upon any constitutional requirement." 409 U. S., at 526. In light of our holding today, the actual result in *Aldridge* should be recognized as an exercise of our supervisory power over federal courts. Cf. n. 9, *supra*.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

In 1973, the Court refused to review the affirmance on direct appeal of Mr. Ross' conviction. 414 U. S. 1080. In dissenting from that refusal, I observed that "[t]o deny this petition for certiorari is to see our decision in *Ham* v. *South Carolina,* [409 U. S. 524 (1973),] stillborn and to write an epitaph for those 'essential demands of fairness' recognized by this Court 40 years ago in *Aldridge* [v. *United States,* 283 U. S. 308 (1931)]." *Id.,* at 1085. Today, in reversing the Court of Appeals' affirmance of the District Court's grant of a writ of habeas corpus, the Court emphatically confirms that the promises inherent in *Ham* and *Aldridge* will not be fulfilled. For the reasons expressed in my dissent from the earlier denial of certiorari, I cannot join in this confirmation. Accordingly, I respectfully dissent.

UNITED STATES *v.* DINITZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74–928. Argued December 2, 1975—Decided March 8, 1976

For repeated misconduct by respondent's counsel (Wagner) during the opening-statement period in respondent's criminal trial, the trial judge expelled Wagner and asked respondent's co-counsel (Meldon) if he was prepared to proceed with the trial. Upon being advised that Meldon had not discussed the case with witnesses, the judge gave him until the next morning to prepare. At that time Meldon advised the judge that respondent wanted Wagner to try the case. After the judge had set forth the alternatives of (1) a delay pending appellate review of the propriety of Wagner's expulsion, (2) continuation of the trial with Meldon as respondent's main counsel, or (3) declaring a mistrial to permit respondent to obtain other counsel, Meldon made a motion for a mistrial, which the judge granted. Before his second trial respondent filed a motion on double jeopardy grounds to dismiss the indictment, which the judge denied. Respondent represented himself at the second trial, which resulted in his conviction. The Court of Appeals reversed, holding that the exclusion of Wagner and the judge's questioning of Meldon left respondent with "no choice" but to request a mistrial; that under the circumstances respondent could not be said to have voluntarily relinquished his right to proceed before the first jury; and that the Double Jeopardy Clause barred the second trial because there had been no manifest necessity for Wagner's expulsion. *Held:* The Double Jeopardy Clause does not bar respondent's retrial. Pp. 606–612.

(a) Though this Court has held that whether there can be a new trial after a mistrial has been declared without the defendant's request depends on whether "there is a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated," *United States* v. *Perez*, 9 Wheat. 579, 580, different considerations obtain when the mistrial has been declared at the instance of the defendant, whose request for a mistrial ordinarily removes any barrier to reprosecution even if necessitated by prosecutorial or judicial error. Pp. 606–608.

(b) The Court of Appeals erred in holding that the manifest-necessity standard should be applied to a mistrial motion when the

defendant has "no choice" but to request a mistrial. Though the Double Jeopardy Clause bars retrials where "bad-faith conduct by judge or prosecutor," *United States* v. *Jorn*, 400 U. S. 470, 485 (plurality opinion), threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant, *Downum* v. *United States*, 372 U. S. 734, 736, here there is no contention or record showing that the trial judge's expulsion of Wagner was in bad faith to goad respondent into requesting a mistrial or to prejudice his acquittal prospects. Pp. 608–611.

504 F. 2d 854, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 612. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 613. STEVENS, J., took no part in the consideration or decision of the case.

John P. Rupp argued the cause for the United States. With him on the brief were *Solicitor General Bork, Acting Assistant Attorney General Keeney, Deputy Solicitor General Frey,* and *Jerome M. Feit.*

Fletcher N. Baldwin, Jr., by appointment of the Court, 421 U. S. 906, argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

The question in this case is whether the Double Jeopardy Clause of the Fifth Amendment was violated by the retrial of the respondent after his original trial had ended in a mistrial granted at his request.

I

The respondent, Nathan Dinitz, was arrested on December 8, 1972, following the return of an indictment charging him with conspiracy to distribute LSD and with

distribution of that controlled substance in violation of 84 Stat. 1260, 1265, 21 U. S. C. §§ 841 (a)(1), 846. On the day of his arrest, the respondent retained a lawyer named Jeffrey Meldon to represent him. Meldon appeared with the respondent at his arraignment, filed numerous pretrial motions on his behalf, and was completely responsible for the preparation of the case until shortly before trial. Some five days before the trial was scheduled to begin, the respondent retained another lawyer, Maurice Wagner, to conduct his defense. Wagner had not been admitted to practice before the United States District Court for the Northern District of Florida, but on the first day of the trial the court permitted him to appear *pro hac vice*. In addition to Meldon and Wagner, Fletcher Baldwin, a professor of law at the University of Florida, also appeared on the respondent's behalf.[1]

The jury was selected and sworn on February 14, 1973, and opening statements by counsel began on the following afternoon. The prosecutor's opening statement briefly outlined the testimony that he expected an undercover agent named Steve Cox to give regarding his purchase of LSD from the respondent. Wagner then began his opening statement for the defense. After introducing himself and his co-counsel, Wagner turned to the case against the respondent:

> "Mr. Wagner: After working on this case over a period of time it appeared to me that if we would have given nomenclature, if we would have named this case so there could be no question about identifying it in the future, I would have called it The Case—
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> "Mr. Reed [Asst. U. S. Attorney]: Your Honor, we object to personal opinions.

[1] Wagner informed the trial judge that he would try the facts of the respondent's case and Baldwin would make arguments of law.

"The Court: Objection sustained. The purpose of the opening statement is to summarize the facts the evidence will show, state the issues, not to give personal opinions. Proceed, Mr. Wagner.

"Mr. Wagner: Thank you, Your Honor. I call this the Case of the Incredible Witness." App. 20.

The prosecutor again objected and the judge excused the jury. The judge then warned Wagner that he did not approve of his behavior and cautioned Wagner that he did not want to have to remind him again about the purpose of the opening statement.

Following this initial incident, the trial judge found it necessary twice again to remind Wagner of the purpose of the opening statement and to instruct him to relate "the facts that you expect the evidence to show, the admissible evidence." *Id.*, at 82. Later on in his statement, Wagner started to discuss an attempt to extort money from the respondent that had occurred shortly after his arrest. The prosecutor objected and the jury was again excused. Wagner informed the trial judge of some of the details of the extortion attempt and assured the court that he would connect it with the prospective Government witness Cox. But it soon became apparent that Wagner had no information linking Cox to the extortion attempt, and the trial judge then excluded Wagner from the trial and ordered him to leave the courthouse.[2]

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[2] Shortly after the arrest of the respondent, someone had telephoned him and said that for $2,000 he would make sure that the case never came to court. The respondent and FBI agents set up a trap to catch the caller, but the unidentified man got away with the "bait envelope."

During the discussion of the incident at the bench, Wagner claimed that, if the description of the man fit Cox, the credibility of

The judge then asked Meldon if he was prepared to proceed with the trial.[3] Upon learning that Meldon had not discussed the case with the witnesses, the judge gave Meldon until 9 o'clock the following morning to prepare. Meldon informed the judge that the respondent was "in a quandary because he hired Mr. Wagner to argue the case and he feels he needs more time to obtain outside counsel to argue the case for him." The judge responded that "[y]ou are his counsel and have been" but stated that he would consider the matter "between now and 9:00 o'clock tomorrow morning." *Id.*, at 35.

The next morning, Meldon told the judge that the respondent wanted Wagner and not himself or Baldwin to try the case. The judge then set forth three alternative courses that might be followed—(1) a stay or recess pending application to the Court of Appeals to review the propriety of expelling Wagner, (2) continuation of the trial with Meldon and Baldwin as counsel, or (3) a declaration of a mistrial which would permit the respondent to obtain other counsel. Following a short recess, Meldon moved for a mistrial, stating that, after "full consideration of the situation and an explanation of the alternatives before him, [the respondent] feels that he would move for a mistrial and that this would be in his

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the chief Government witness would be placed in doubt. The judge then ordered that the FBI agents be called to determine if the person taking the envelope resembled Cox. When they arrived, Wagner admitted that he had never seen or talked to the agents. The FBI agents later informed the judge *in camera* that the person who picked up the "bait envelope" containing the fake money bore no resemblance to Agent Cox.

[3] After the judge excluded Wagner, he examined Meldon about his role in the preparation of the opening statement. Meldon responded that he had conveyed information about the extortion attempt to Wagner but had not represented that Cox was involved and had not worked with Wagner on the opening statement.

best interest." *Id.*, at 41. The Government prosecutor did not oppose the motion. The judge thereupon declared a mistrial, expressing his belief that such a course would serve the interest of justice.

Before his second trial, the respondent moved to dismiss the indictment on the ground that a retrial would violate the Double Jeopardy Clause of the Constitution. This motion was denied. The respondent represented himself at the new trial, and he was convicted by the jury on both the conspiracy and distribution counts.[4] A divided panel of the Court of Appeals for the Fifth Circuit reversed the conviction, holding that the retrial violated the respondent's constitutional right not to be twice put in jeopardy.[5] 492 F. 2d 53. The appellate court took the view that the trial judge's exclusion of Wagner and his questioning of Meldon had left the respondent no choice but to move for a mistrial. *Id.*, at 59. On that basis, the court concluded that the respondent's request for a mistrial should be ignored and the case should be treated as though the trial judge had declared a mistrial over the objection of the defendant. *Ibid.* So viewing the case, the court held that the Double Jeopardy Clause barred the second trial of the respondent, because there had been no manifest necessity requiring the expulsion of Wagner.[6] The Court of Appeals

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[4] The respondent was a third-year law student at the time of his arrest.

[5] The Court of Appeals dealt only with the respondent's double jeopardy claim and did not reach any of his other claims of error. 492 F. 2d 53, 54.

[6] The Court of Appeals held that the trial judge failed to consider adequate alternatives available to deal with Wagner's conduct. Among the alternatives the court suggested were a warning that he would be cited for contempt if the practices continued, an actual citation for contempt, filing of a complaint with the grievance committee of the state bar, and taking action to prevent him from prac-

granted rehearing en banc and, by a vote of 8–7, affirmed the decision of the panel.[7] 504 F. 2d 854. We granted certiorari to consider the constitutional question thus presented. 420 U. S. 1003.

II

The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense.[8] See *United States* v. *Wilson*, 420 U. S. 332, 343; *North Carolina* v. *Pearce*, 395 U. S. 711, 717. Underlying this constitutional safeguard is the belief that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S. 184, 187–188. Where, as here, a mistrial has been declared, the defendant's "valued right to have his trial completed by a particular tribunal" is also implicated. *Wade* v. *Hunter*, 336 U. S. 684, 689; *United States* v. *Jorn*, 400 U. S. 470, 484–485 (plurality opinion); *Downum* v. *United States*, 372 U. S. 734, 736.

Since Mr. Justice Story's 1824 opinion for the Court in *United States* v. *Perez*, 9 Wheat. 579, 580, this Court has held that the question whether under the Double Jeopardy Clause there can be a new trial after a mistrial

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ticing again in the United States District Court for the Northern District of Florida. *Id.*, at 60–61.

[7] The court's en banc *per curiam* opinion employed reasoning similar to that of the panel majority. See n. 10, *infra*.

[8] The Double Jeopardy Clause of the Fifth Amendment was held to be applicable to the States through the Fourteenth Amendment in *Benton* v. *Maryland*, 395 U. S. 784.

has been declared without the defendant's request or consent depends on whether "there is a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated." *Illinois* v. *Somerville*, 410 U. S. 458, 461; *United States* v. *Jorn*, *supra*, at 481; *Gori* v. *United States*, 367 U. S. 364, 368–369; *Wade* v. *Hunter*, *supra*, at 689–690; *Simmons* v. *United States*, 142 U. S. 148, 153–154. Different considerations obtain, however, when the mistrial has been declared at the defendant's request.[9] The reasons for the distinction were discussed in the plurality opinion in the *Jorn* case:

> "If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. In the absence of such a motion, the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.

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[9] See *United States* v. *Tateo*, 377 U. S. 463, 467: "If Tateo had *requested* a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the Government would not have been barred from retrying him." (Emphasis in original.)

See *United States* v. *Perez*, 9 Wheat., at 580." 400 U. S., at 485 (footnote omitted).

The distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause. Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire "to go to the first jury and, perhaps, end the dispute then and there with an acquittal." *United States* v. *Jorn*, *supra*, at 484. Our prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a *sua sponte* judicial declaration of mistrial. But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions.

The Court of Appeals viewed the doctrine that permits a retrial following a mistrial sought by the defendant as resting on a waiver theory. The court concluded, therefore, that "something more substantial than a Hobson's choice" is required before a defendant can "be said to have relinquished voluntarily his right to proceed before the first jury." [10] See 492 F. 2d, at 59. The court thus

[10] The brief *per curiam* opinion of the Court of Appeals en banc concluded:

"In order for a defendant's motion for a mistrial to constitute a

held that no waiver could be imputed to the respondent because the trial judge's action in excluding Wagner left the respondent with "no choice but to move for or accept a mistrial." *Ibid.* But traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error. See *United States* v. *Jorn,* 400 U. S., at 484–485, n. 11; *United States* v. *Jamison,* 164 U. S. App. D. C. 300, 305–306, 505 F. 2d 407, 412–413. In such circumstances, the defendant generally does face a "Hobson's choice" between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.[11]

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bar to a later plea of double jeopardy, some choice to proceed or start over must remain with the defendant at the time his motion is made. The dicta from United States v. Jorn . . . does not encompass the extraordinary circumstances of the present case, in which judicial error alone, rather than defendant's exercise of any option to stop or go forward, took away his 'valued right to have his trial completed by a particular tribunal.' " 504 F. 2d 854–855 (footnote omitted).

[11] The respondent characterizes a defendant's mistrial motion as a waiver of "his right not to be placed twice in jeopardy" and argues that to be valid the waiver must meet the knowing, intelligent, and voluntary standard set forth in *Johnson* v. *Zerbst,* 304 U. S. 458. This approach erroneously treats the defendant's interest in going forward before the first jury as a constitutional right comparable to the right to counsel. It fails to recognize that the protection against the burden of multiple prosecutions underlying the constitutional prohibition against double jeopardy may be served by a mistrial declaration and the concomitant relinquishment of the opportunity to obtain a verdict from the first jury. This Court has implicitly rejected the contention that the permissibility of a retrial

The Court of Appeals' determination that the manifest necessity standard should be applied to a mistrial motion when the defendant has "no choice" but to request a mistrial undermines rather than furthers the protections of the Double Jeopardy Clause. In the event of severely prejudicial error a defendant might well consider an immediate new trial a preferable alternative to the prospect of a probable conviction followed by an appeal, a reversal of the conviction, and a later retrial. Yet the Court of Appeals' decision, in effect, instructs trial judges to reject the most meritorious mistrial motion in the absence of manifest necessity and to require, instead, that the trial proceed to its conclusion despite a legitimate claim of seriously prejudicial error.[12] For if a trial judge follows that course, the Double Jeopardy Clause will present no obstacle to a retrial if the conviction is set aside by the trial judge or reversed on appeal. *United States* v. *Ball*, 163 U. S. 662.[13]

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following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right. See *Breed* v. *Jones*, 421 U. S. 519, 534; *United States* v. *Wilson*, 420 U. S. 332, 343–344, n. 11; *United States* v. *Jorn*, 400 U. S. 470, 484–485, n. 11 (plurality opinion); *United States* v. *Tateo*, 377 U. S., at 466.

[12] As the dissenting judge on the original Court of Appeals panel noted, the court's decision would "give rise to much reluctance in granting mistrials" because "[t]he trial courts will understand that society will be better served by completing a trial, even after clear error has arisen and the defendant seeks the mistrial, than the alternative of a mistrial and the possible bar of double jeopardy based on the error." 492 F. 2d, at 63 (Bell, J., dissenting).

[13] This Court's decisions permitting retrials after convictions have been set aside at the defendant's behest clearly indicate "that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error." *United States* v.

The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," *United States* v. *Jorn, supra,* at 485, threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. *Downum* v. *United States,* 372 U. S., at 736. See *Gori* v. *United States,* 367 U. S., at 369; *United States* v. *Jorn, supra,* at 489 (STEWART, J., dissenting); cf. *Wade* v. *Hunter,* 336 U. S., at 692.

But here the trial judge's banishment of Wagner from the proceedings was not done in bad faith in order to goad the respondent into requesting a mistrial or to prejudice his prospects for an acquittal. As the Court of Appeals noted, Wagner "was guilty of improper conduct" during his opening statement which "may have justified disciplinary action," 492 F. 2d, at 60–61. Even accepting the appellate court's conclusion that the trial judge overreacted in expelling Wagner from the courtroom, *ibid.,* the court did not suggest, the respondent has not contended, and the record does not show that the judge's action was motivated by bad faith or undertaken to harass or prejudice the respondent.[14]

Under these circumstances we hold that the Court of Appeals erred in finding that the retrial violated the

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Jorn, supra, at 484. See *United States* v. *Tateo, supra,* at 466; cf. *Wade* v. *Hunter,* 336 U. S. 684, 688–689.

[14] The record indicates that the judge expected the trial to continue with Meldon representing the respondent in Wagner's absence. The judge knew that Meldon was an attorney of record who had represented the respondent from the outset of the case. It was not until after Wagner was excluded that the trial judge learned that the respondent would not permit Meldon to represent him.

respondent's constitutional right not to be twice put in jeopardy. Accordingly, the judgment before us is reversed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, concurring.

I concur fully with MR. JUSTICE STEWART's opinion for the Court. I add an observation only to emphasize what is plainly implicit in the opinion, *i. e.*, a trial judge's plenary control of the conduct of counsel particularly in relation to addressing the jury.

An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict.

A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop such professional misconduct. Here the misconduct of the attorney, Wagner, was not only unprofessional *per se* but contemptuous in that he defied the court's explicit order.

Far from "overreacting" to the misconduct of Wagner,

in my view, the trial judge exercised great restraint in not citing Wagner for contempt then and there.*

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

The Court's premise is that the mistrial was directed at respondent's request or with his consent. I agree with the Court of Appeals that, for purposes of double jeopardy analysis, it was not, but rather that "the trial judge's response to the conduct of defense counsel deprived Dinitz's motion for a mistrial of its necessary consensual character." 492 F. 2d 53, 59 n. 9 (1974). Therefore the rule that "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution," *United States* v. *Jorn*, 400 U. S. 470, 485 (1971) (plurality opinion), is inapplicable. Accordingly, I agree that respondent's motion, for the reasons expressed in the panel and en banc opinions of the Court of Appeals, did not remove the bar of double jeopardy to reprosecution in "the extraordinary circumstances of the present case, in which judicial error alone, rather than [respondent's] exercise of any option to stop or go forward, took away his 'valued right to have his trial completed by a particular tribunal.'" 504 F. 2d 854–855 (1974). I also agree with the holding in the panel opinion that "[i]n view of . . . [the] alternatives which would not affect the ability to continue the trial, we cannot say that there was manifest necessity for the trial judge's actions." 492 F. 2d., at 61. I would affirm.

*A bar association conscious of its public obligations would *sua sponte* call to account an attorney guilty of the misconduct shown here. See Report of American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 60–66 (Final Draft 1970); American Bar Association Project on Standards for Criminal Justice, Administration of Criminal Justice—The Defense Function, § 7.4, p. 131 (1974 Compilation).

COMMISSIONER OF INTERNAL REVENUE *v.* SHAPIRO ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74–744. Argued November 5, 1975—Decided March 8, 1976

Finding that the imminent departure of respondent taxpayer Samuel Shapiro (hereinafter respondent) for Israel under an extradition order to stand trial there on criminal charges jeopardized the collection of income taxes claimed owed by respondent for 1970 and 1971, petitioner Commissioner of Internal Revenue made a jeopardy assessment, filed liens against respondent, and served notices of levy on various banks in which respondent had accounts or safe-deposit boxes. Respondent then brought suit, claiming that he owed no taxes, that he could not litigate the issue while jailed in Israel, and that he would be in jail there unless he could use the levied bank accounts as bail money, and seeking an order enjoining his extradition until he could litigate whether he owed taxes or directing the Internal Revenue Service to lift the levy notices. After the Commissioner, in response to interrogatories, furnished deficiency notices disclosing that the claimed bases for the assessments were for 1970 unexplained cash bank deposits and for 1971 income derived from alleged narcotics sales, the District Court dismissed the complaint on the ground, *inter alia*, that the Anti-Injunction Act (Act), § 7421 (a) of the Internal Revenue Code, which prohibits suits for the purpose of restraining the assessment or collection of taxes, withdrew its jurisdiction to order levies lifted. The Court of Appeals disagreed and remanded for further proceedings, holding that an unresolved fact issue existed as to whether the case fell within the exception to the Act formulated in *Enochs* v. *Williams Packing Co.*, 370 U. S. 1, 7, whereby an injunction may be obtained against the collection of any tax if (1) it is "clear that under no circumstances could the Government ultimately prevail" and (2) "equity jurisdiction" otherwise exists in that the taxpayer shows that he would otherwise suffer irreparable injury. The court found that respondent had satisfied the second test because he would be incarcerated until his bank accounts could be used for bail money, and that as to the first test the District Court should not have dismissed the

complaint without a further inquiry into whether upon viewing the law and the facts most favorably to the Commissioner there was no "factual foundation" for his claim that respondent was a tax-delinquent narcotics dealer during 1971 and thus no basis for the assessment. *Held:* The Act did not require dismissal of respondent's complaint. Pp. 624–633.

(a) Whether the Commissioner has a chance of ultimately prevailing for purposes of the *Williams Packing* exception is a question to be resolved on the basis of the information available to the Commissioner at the time of the suit. Hence, the Court of Appeals did not err in declining to specify the precise manner in which the relevant facts would be revealed on remand, since whether the Commissioner discloses such facts because he has the technical burden of proof or discloses them in response to a discovery motion or interrogatories, under *Williams Packing* the relevant facts are those in the Commissioner's possession and must somehow be obtained from him. Pp. 624–628.

(b) The Act's primary purpose is not interfered with by not requiring the taxpayer to plead specific facts which, if true, would establish that the Commissioner cannot ultimately prevail, since the collection of taxes will not be restrained unless the District Court is persuaded from the evidence eventually adduced that the Commissioner will under no circumstances prevail. Moreover, the Act's "collateral objective" to protect the collector from tax litigation outside the statutory scheme is not undercut, since the taxpayer himself must still plead and prove facts establishing that his remedy in the Tax Court or in a refund suit is inadequate to repair any injury caused by an erroneous assessment or collection, in which case the Commissioner is required simply to litigate the question whether his assessment has a basis in fact. Pp. 628–629.

(c) While to permit the Commissioner to seize and hold property on the mere good-faith allegation of an unpaid tax would raise serious due process problems in cases like this one, where it is asserted that seizure of assets pursuant to a jeopardy assessment is causing irreparable injury, the case may be resolved, under the *Williams Packing* exception, solely by reference to the Act, whose required standard as to affording the taxpayer an opportunity for a hearing and as to the evidence necessary to show that an assessment has a basis in fact is at least as favorable to the taxpayer as that required by the Constitution. Pp. 629–633.

162 U. S. App. D. C. 391, 499 F. 2d 527, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 634. STEVENS, J., took no part in the consideration or decision of the case.

Acting Deputy Assistant Attorney General Baum argued the cause for petitioner. On the brief were *Solicitor General Bork, Assistant Attorney General Crampton, Stuart A. Smith,* and *Ernest J. Brown.*

Nathan Lewin argued the cause for respondents. With him on the brief were *Herbert J. Miller, Jr.,* and *Martin D. Minsker.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents questions relating to the scope of the Internal Revenue Code's Anti-Injunction Act, 26 U. S. C. § 7421 (a),[1] in the context of a summary seizure of a taxpayer's assets pursuant to a jeopardy assessment. §§ 6861, 6331, 6213.

I

Normally, the Internal Revenue Service may not "assess" a tax or collect it, by levying on or otherwise seizing a taxpayer's assets, until the taxpayer has had an opportunity to exhaust his administrative remedies, which include an opportunity to litigate his tax liability

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[1] Title 26 U. S. C. § 7421 (a) provides in full:

"(a) Tax.

"Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

fully in the Tax Court, 26 U. S. C. §§ 6212, 6213; [2] and if the Internal Revenue Service does attempt to collect the tax by levy or otherwise, before such exhaustion of remedies in violation of § 6213, the collection is not protected by the Anti-Injunction Act and may be restrained by a United States district court at the instance of the taxpayer. §§ 6213 (a), 7421 (a). The rule is otherwise when the Commissioner proceeds under § 6861 and finds that collection of a tax due and owing from a taxpayer will be "jeopardized by delay" in collection. In such a case, the Commissioner may immediately assess the tax and, upon "notice and demand . . . for payment thereof" followed by the taxpayer's "failure or refusal to pay such

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[2] Title 26 U. S. C. § 6212 provides in relevant part:

"(a) In general.

"If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 42, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail."

Title 26 U. S. C. § 6213 provides in relevant part:

"(a) Time for filing petition and restriction on assessment.

"Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

tax," may immediately levy on the taxpayer's assets. §§ 6861, 6331.[3] When the Commissioner follows this procedure, the Anti-Injunction Act applies in full force and

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[3] Title 26 U. S. C. § 6331 provides in relevant part:

"(a) Authority of Secretary or delegate.

"If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

"(b) Seizure and sale of property.

"The term 'levy' as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible)."

Title 26 U. S. C. § 6861 provides in relevant part:

"(a) Authority for Making.

"If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213 (a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by

"no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." § 7421 (a).

In this case, the Commissioner found, on December 6, 1973, that the imminent departure of respondent Samuel Shapiro (hereinafter Shapiro or respondent) for Israel and the probable departure with him of the assets in his New York bank accounts and safe-deposit boxes jeopardized the collection of income taxes claimed to be due and owing by him for the tax years 1970 and 1971. Accordingly, he assessed income taxes against respondent in the amount of $92,726.41 for the tax years 1970 and 1971. On the same day, he filed liens against respondent and served notices of levy upon various banks in New York State in which respondent maintained accounts or had safe-deposit boxes. These notices of levy effectively froze the money in the accounts—totaling about $35,000—and the contents of the safe-deposit boxes.

At that time respondent Shapiro was under a final order of extradition to Israel, for trial on criminal fraud charges, issued by the United States District Court for the Southern District of New York, and was scheduled to leave for Israel on December 9, 1973—three days later. That date had been set as a result of an agreement between Shapiro and the State of Israel pursuant to which he had withdrawn a petition for writ of certiorari seeking review by this Court of the affirmance of the extradition order by the Court of Appeals for the Second Circuit,

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law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

"(b) Deficiency Letters.

"If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212 (a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment."

Shapiro v. *Ferrandina*, 478 F. 2d 894 (1973), and the State of Israel had agreed to grant him a speedy trial when he arrived in Israel and to release him on $60,000 bail pending such trial.

Upon learning of the notices of levy, respondent obtained the consent of the State of Israel to postpone his extradition date until December 16, 1973; and then on December 13, 1973, he initiated the instant lawsuit. Claiming that he owed no taxes; that he could not litigate the issue with the Internal Revenue Service while in jail in Israel; that he would be in jail in Israel, unless he could use the frozen $35,000 as bail money; and that the Internal Revenue Service had deliberately and in bad faith waited until December 6, 1973, before filing its notices of levy precisely in order to place him in this predicament, respondent requested in his complaint an order enjoining his extradition until he had an opportunity to litigate the question whether he owed the Internal Revenue Service any taxes or, in the alternative, an order directing the Internal Revenue Service to lift the notices of levy.

Over the Government's claim that the court lacked jurisdiction over the case by reason of the Anti-Injunction Act and because the timing of an extradition is a matter within the exclusive jurisdiction of the Executive Branch, the District Court granted a temporary restraining order against extradition on December 13, 1973, and set argument on the motion for a preliminary injunction for December 19, 1973, later postponed until December 21, 1973. Interrogatories were then served on the Government inquiring, *inter alia*, into the basis for the assessments. In partial, expedited, response to the interrogatories, the Government stated on December 19, 1973, that respondent was not yet entitled to know the basis for the assessments. Then on December 21,

1973, the Commissioner served counsel for respondent with supplements to the responses to the interrogatories to which were appended notices of deficiency, see 26 U. S. C. § 6212. The notices of deficiency disclosed that the 1970 assessment was based on unexplained cash bank deposits of $18,000 and that the 1971 assessment was based on income in the amount of $137,280 derived from respondent's alleged activities as a dealer in narcotics.[4] On that date, the District Court dissolved the temporary restraining order and granted the Commissioner's motion to dismiss the complaint. The court concluded that the Anti-Injunction Act withdrew its jurisdiction to order the levies to be lifted, and that the timing of the extradition, validly ordered by the United States District Court for the Southern District of New York under a treaty with Israel, was a matter within the exclusive jurisdiction of the State Department.

On December 26, 1973, after respondent had filed a notice of appeal, the Court of Appeals for the District of Columbia Circuit stayed the extradition pending resolution of that appeal.[5] The stay was lifted by the Court

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[4] The relevant part of the deficiency notice for the year 1970 provided:

"It is determined that you realized unreported taxable income from unexplained bank deposits at the 1st National City Bank in the amount of $18,000.00." App. 135.

The relevant part of the deficiency notice for the year 1971 provided, *id.*, at 136:

"It is determined that you realized unreported taxable income in the amount of $137,280.00 for the taxable year ended December 31, 1971 from your activities as a dealer in narcotics, computed as follows:

"Gross income from hashish sales	$381,680.00
"Less: costs	244,400.00
"Net Income	$137,280.00"

[5] On January 3, 1974, respondent, armed with his deficiency

of Appeals on February 12, 1974. On May 15, 1974, the Court of Appeals affirmed the District Court's holding that it had no jurisdiction over the extradition order and respondent was extradited several days thereafter.[6] The Court of Appeals, however, disagreed with the District Court that it had no jurisdiction to consider the claim for relief from the levies and remanded for further proceedings. *Shapiro* v. *Secretary of State*, 162 U. S. App. D. C. 391, 499 F. 2d 527 (1974).

The Court of Appeals held that an unresolved fact issue existed on the question whether this case falls within the narrow exception to the Anti-Injunction Act formulated in this Court's decision in *Enochs* v. *Williams Packing Co.*, 370 U. S. 1 (1962).[7] As the court under-

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notice, filed in the Tax Court for a redetermination of the deficiency. 26 U. S. C. § 6213 (a).

[6] The extradition issue is therefore no longer in this case.

[7] The Court of Appeals rejected, on the record before it, and on the authority of *Phillips* v. *Commissioner*, 283 U. S. 589 (1931), respondent's claim that the assessment absent a hearing violated the Due Process Clause. It noted, however, that if respondent could establish on remand that his extradition would prevent him from litigating effectively before the Tax Court, then one of the predicates for the *Phillips* decision would be lacking. The court also noted, but did not resolve, a factual dispute as to whether the levy was in conformity with the statute. Shapiro had alleged, for the first time on appeal, that no notice had been given to him or demand made of him to pay the taxes at the time the levies were served. Such notice and demand are required by 26 U. S. C. § 6861, compliance with which is necessary under § 6213 (a), if the Anti-Injunction Act is to apply. The Commissioner claimed that he had mailed a deficiency notice to Shapiro on December 6, 1973.

It is clear that a demand has now been made for payment of the tax assessed and that the levies are now in compliance with § 6213. A notice of deficiency was served on Shapiro's attorney in the District Court on December 21, 1973. The Internal Revenue Service, conceding that it could not be sure whether the original notice of deficiency was mailed before or after the notices of levy were served, served new notices of levy on October 11 and 15,

stood the *Williams Packing* decision, the Anti-Injunction Act does not deprive the District Court of jurisdiction to restrain collection of a tax, if (1) the taxpayer shows "extraordinary circumstances causing irreparable harm" for which he has no "adequate remedy at law," and (2) it is apparent that, under the most liberal view of the law and the facts, the United States " 'cannot establish its claim.' " 162 U. S. App. D. C., at 396, 499 F. 2d, at 532. The court found that Shapiro had satisfied the first test: the money frozen in his New York banks was to be used as bail money in Israel, and without it Shapiro would be incarcerated. Accordingly, his remedy at law—*i. e.*, his ability later to contest the validity of the assessment in the Tax Court or in a suit for a refund—was inadequate. As for the second test, the court concluded that the District Court should not have dismissed the complaint without further inquiry into the factual foundation for the jeopardy assessment and that further proceedings were necessary before finally determining whether upon viewing the law and the facts most favorably to the Government there was "no factual foundation" for the Government's claim that Shapiro was a tax-delinquent narcotics dealer during 1971 and thus no basis for the assessment. Accordingly, the court remanded in order to "allow the District Court . . . to develop a record" and to determine in light of it whether the asserted deficiency was "so arbitrary and excessive" [8] as to be an exaction in the guise of a tax.[9] *Id.*, at 399, 499 F. 2d, at 535.

1974. This moots both the question whether the IRS mailed a notice of deficiency to Shapiro on December 6, 1973, and whether the notice preceded the levies. There can be no question at this point, therefore, that in these respects the levies are in technical compliance with the provisions of § 6861.

[8] This standard, considered by the Court of Appeals to be con-

[*Footnote 9 is on p. 624*]

II

The Government argues that the order of the Court of Appeals was erroneous because it placed a burden on the Government to prove a factual basis for its assess-

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sistent with *Enochs* v. *Williams Packing* was based on cases decided by other Courts of Appeals, primarily *Pizzarello* v. *United States*, 408 F. 2d 579 (CA2 1969), and *Lucia* v. *United States*, 474 F. 2d 565 (CA5 1973) (en banc).

[9] Subsequent to the time of the Court of Appeals' order and prior to argument of this case before this Court, several things have concededly occurred of arguable relevance to this lawsuit. First, respondent Shapiro has been extradited, the State of Israel has reduced the amount of his bail and he has been able to meet it. Accordingly, he is not—as the Court of Appeals assumed he would be—incarcerated as a result of the fact that the levies have put the money in the New York banks beyond his reach. Second, the District Court interpreted the Court of Appeals' order in this case to require the Government to come forward with proof sufficient to establish a factual foundation for the tax assessment and to negative a finding that the assessment is "entirely excessive, arbitrary, capricious, and without factual foundation." The Government then made an effort at compliance with the District Court's order, consisting of the filing of an affidavit by the revenue agent who investigated respondent's income tax liabilities. The affidavit states that the basis for the assessments is as follows:

"a. There was no record that Samuel Shapiro had filed an income tax return for 1970.

"b. That Samuel Shapiro had filed an income tax return for 1971 reporting no tax liability based upon $1,600 in adjusted gross income, consisting of $2,600 miscellaneous income from private tutoring and net short-term losses from commodity transactions of $1,450 (limited to $1,000 in computing adjusted gross income).

"c. That deposits were credited to two accounts in the name of Samuel Shapiro at the First National City Bank, New York, Nos.: 04993564 and 05008773, in the amounts of $18,000 in 1970 and $36,735 in 1971.

"d. That . . . Samuel Shapiro paid in excess of $3,000 in currency for the purchase of an automobile.

"e. That information available to the Internal Revenue Service

ment instead of requiring the taxpayer to prove that "under no circumstances could the Government ultimately prevail." *Enochs* v. *Williams Packing Co.*, 370

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indicated that early in 1973 Samuel Shapiro paid over $40,000 for a home purchased for over $60,000.

"f. That information supplied to the Internal Revenue Service indicated that Samuel Shapiro had been smuggling into the United States substantial amounts of an illegal substance, hashish, every six days from Israel, presumably for resale within the United States, and also supported a conclusion that Samuel Shapiro was dealing in hashish, during 1971.

"g. That included in the 1971 bank deposits referred to in subparagraph (c) above, were money transfers from an individual since convicted of selling hashish, who stated that the transfers were for hashish supplied to him by Samuel Shapiro as follows:

"April 19, 1971	$2,000
"April 23, 1971	2,300
"May 6, 1971	2,000
"May 11, 1971	1,500
"June 8, 1971	1,500
"August 18, 1971	5,600

"h. That information available to the Internal Revenue Service indicated that the known practice in hashish trafficking was to deal in full kilos (kilograms), equal to 2.2 pounds; that during 1971 the retail price of hashish was $1,360 to $1,980 per pound, or $2,992 to $4,356 per kilo; and that the wholesale cost to a dealer would approximate $2,350 per kilo; and that the common practice in hashish dealing was to receive payment in two parts—the first for cost and the second for profit.

"i. That on the basis of the information set forth in subparagraphs g. and h. above, [the revenue agent] concluded that during 1971 Samuel Shapiro was dealing in at least 2 kilos of hashish per week, and that his taxable profit therefrom was $137,280, computed as follows:

"Selling price	$7,340
"Cost	4,700
"Weekly profit	2,640
"1971 profit (52 weeks)	$137,280

[*Footnote 9 is continued on p. 626*]

U. S., at 7. The Government argues further that since the taxpayer had and still has wholly failed to prove or even plead specific facts establishing that the Government can under no circumstances prevail, the Court of Appeals should have affirmed the District Court's initial dismissal and its decision to the contrary should be reversed.

Respondent argues on the other hand that unless the Government has some obligation to disclose the factual basis for its assessments, either in response to a discovery request or on direct order of the court, the exception to the Anti-Injunction Act provided in *Enochs* v. *Williams Packing Co., supra,* is meaningless. The taxpayer can never know, unless the Government tells him, what the

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"j. That unexplained deposits of $18,000 during 1970 should be deemed to be taxable income."

At a hearing held by the District Court on November 12, 1974, respondent submitted two affidavits (which had been filed in the Tax Court) denying that he was or ever had been a dealer in narcotics. Respondent's affidavits further stated that his 1971 income tax return was correct. Respondent also submitted an affidavit of Rachel Laub, a resident of Switzerland, which stated that at respondent's request in 1970, she held for him in safekeeping $50,000 in cash and approximately 18 to 20 kilos of gold bars. That affidavit further stated that at respondent's request, she transmitted the cash to him in 1971, and the proceeds of the sale of the gold bars ($32,000 and $35,000) in 1971 and 1972, respectively. Finally, the District Judge has tentatively ruled that the Government must, if the court is to deny injunctive relief, submit its informant for *in camera* examination by the court. Following the Court's granting of the Government's petition for a writ of certiorari, 420 U. S. 923 (1975), no further proceedings have taken place below.

The proceedings before the District Court on remand and the other events just described are, of course, not before us at this time. These proceedings occurred after the decision of the Court of Appeals which we review. However, the parties appear to agree that these events have occurred as described, and we mention them because they are relevant to the question of what proceedings must eventually be conducted by the District Court following our decision in this case.

basis for the assessment is and thus can never show that the Government will certainly be unable to prevail. We agree with Shapiro.

In *Enochs* v. *Williams Packing Co., supra,* the Court held that an injunction may be obtained against the collection of any tax if (1) it is "clear that under no circumstances could the Government ultimately prevail" and (2) "equity jurisdiction" otherwise exists, *i. e.,* the taxpayer shows that he would otherwise suffer irreparable injury. 370 U. S., at 7. The Court also said that "the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of the suit," *ibid.* The Government's claim that the Court of Appeals placed on it the burden of justifying its assessment and thereby erroneously applied the *Williams Packing* rule is wrong. *Williams Packing* did not hold that the taxpayer's burden of persuading the District Court that the Government will under no circumstances prevail must be accomplished without any disclosure of information by the Government. It says instead that the question will be resolved on the basis of the information available to the Government at the time of the suit. Since it is absolutely impossible to determine what information is available to the Government at the time of the suit, unless the Government discloses such information in the District Court pursuant to appropriate procedures, it is obvious that the Court in *Williams Packing* intended some disclosure by the Government. Although the Government casts its argument in terms of "burden of proof," the Court of Appeals did not place any technical burden of producing evidence on the Government and it would appear to matter little whether the Government discloses such information because it is said to have the burden of producing evidence on the question or whether it

discloses such evidence by responding to a discovery motion made or interrogatories served by the taxpayer—in which case the burden of producing evidence may be said to have rested with the taxpayer. Thus the Court of Appeals cannot be said to have erred in declining to specify the precise manner in which the relevant facts would be revealed on remand. In either event, under *Williams Packing* the relevant facts are those in the Government's possession and they must somehow be obtainable from the Government.[10]

The Government argues, however, that unless the taxpayer is required to plead specific facts which, if true, would establish that the Government cannot ultimately prevail, then the Anti-Injunction Act is eviscerated. Any taxpayer can allege in conclusory fashion that he owes no tax and, therefore, under the Court of Appeals' decision, any taxpayer may in effect force the Government to justify its assessment in a United States District Court—thereby interfering with a "collateral objective" of the Act, *Enochs* v. *Williams Packing Co., supra,* at 7–8, *i. e.,* to protect the collector from tax litigation outside of the statutory scheme provided by Congress. As the Government's argument itself implicitly concedes, the primary purpose of the Act is not interfered with, since the collection of taxes will not be restrained unless the District Court is persuaded from the evidence eventually adduced that the Government will under no circumstances prevail. We do not understand the Court of Appeals to have departed from this stand-

[10] We believe that it is consistent with *Williams Packing* to place the burden of producing evidence with the taxpayer, and to require, if the Government insists, that facts in its sole possession be obtained through discovery. However, nothing we say here should prevent the Government from voluntarily and immediately disclosing the basis for its assessment, which, if sufficient, would terminate discovery proceedings and justify judgment for the Government.

ard enunciated in *Williams Packing*, or to have removed from the taxpayer the ultimate burden, which that decision appears to place on him, of persuading the District Court that it has been met. Moreover, the "collateral objective" of the Act is undercut no more than was contemplated by *Williams Packing*. The taxpayer himself must still plead and prove facts establishing that his remedy in the Tax Court or in a refund suit is inadequate to repair any injury that might be caused by an erroneous assessment or collection of an asserted tax liability. Even then, the Government is not required to litigate fully the taxpayer's liability outside the statutory scheme provided by Congress. It is required simply to litigate the question whether its assessment has a basis in fact.

Our conclusion that the Court of Appeals correctly reversed the judgment of the District Court and remanded for further proceedings is fortified by the fact that construing the Act to permit the Government to seize and hold property on the mere good-faith allegation of an unpaid tax would raise serious constitutional problems in cases, such as this one, where it is asserted that seizure of assets pursuant to a jeopardy assessment is causing irreparable injury. This Court has recently and repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made.[11] Here the Government seized respondent's prop-

[11] *Goldberg* v. *Kelly*, 397 U. S. 254, 264 (1970) (temporary deprivation of welfare payments may deprive recipient of "the very means by which to live while he waits"); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 341–342 (1969) (temporary deprivation of

erty and contends that it has absolutely no obligation to prove that the seizure has any basis in fact no matter how severe or irreparable the injury to the taxpayer and no matter how inadequate his eventual remedy in the Tax Court.[12]

It is true that in *Phillips* v. *Commissioner*, 283 U. S.

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wages may "drive a wage-earning family to the wall"); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601, 608 (1975) ("probability of irreparable injury" sufficient to warrant preseizure probable-validity hearing); see also *Gerstein* v. *Pugh*, 420 U. S. 103 (1975) (incarceration must be preceded by probable-cause finding or promptly followed by probable-cause hearing); cf. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 156 (1974) (no probable-cause hearing required where complainant eventually will be "made whole" for any inadequacy in compensation for confiscated property).

[12] We have often noted that, in resolving a claimed violation of procedural due process, a careful weighing of the respective interests is required, *Goss* v. *Lopez*, 419 U. S. 565, 579 (1975); and we have noted that the Government's interest in collecting the revenues is an important one, *Fuentes* v. *Shevin*, 407 U. S. 67, 92 (1972). This interest is clearly sufficient to justify seizure of a taxpayer's assets without a *pre*seizure hearing, *Fuentes* v. *Shevin*, *supra*, and to remove any need to subject the Commissioner to the burden of an inquiry into the basis for his assessment absent factual allegations of irreparable injury by the taxpayer. *Phillips* v. *Commissioner*, 283 U. S. 589, 595–597 (1931). However, it is very doubtful that the need to collect the revenues is a sufficient reason to justify seizure causing irreparable injury without a prompt post-seizure inquiry of any kind into the Commissioner's basis for his claim.

The taxpayer has no right to start a proceeding before the Tax Court for 60 days following a jeopardy seizure: the IRS may under the statute wait 60 days before it issues the deficiency notice which gives the taxpayer his "ticket to the Tax Court." 26 U. S. C. § 6861. The record does not indicate how quickly a hearing on the merits can be obtained there. Preliminary relief is not there available. Nothing we hold today, of course, would prevent the Government from providing an administrative or other forum outside the Art. III judicial system for whatever preliminary inquiry is to be made as to the basis for a jeopardy assessment and levy.

589 (1931), this Court sustained against constitutional challenge the statutory scheme created by Congress for the litigation of tax disputes and in so doing referred both to the jeopardy assessment provisions and the Anti-Injunction Act, *id.*, at 596 n. 6. However, the *Phillips* case itself did not involve a jeopardy assessment and the taxpayer's assets could not have been taken or frozen in that case until he had either had, or waived his right to, a full and final adjudication of his tax liability before the Tax Court (then the Board of Tax Appeals). The taxpayer's claim in that case was simply that a statutory scheme which would permit the tax to be assessed and collected prior to any *judicial* determination of his liability—by way of a refund suit or review of the Board of Tax Appeals' decision—was unconstitutional.[13] Thus, insofar as *Phillips* may be said to have sustained the constitutionality of the Anti-Injunction Act, as applied to a jeopardy assessment and consequent levy on a taxpayer's assets without prompt opportunity for final resolution of the question of his liability by the Tax Court, it did so only by way of dicta. The dicta were carefully expressed. The Court said:

> "*Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights,* summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.
>
> . . . . .
>
> "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial

[13] The taxpayer also challenged unsuccessfully the provision requiring a court of appeals to give deference to a fact determination by the Board of Tax Appeals on review of the Board's decision.

> of due process, *if the opportunity given for the ultimate judicial determination of the liability is adequate. . . .*" *Id.*, at 595, 596–597. (Emphasis supplied.)

Accordingly, neither the holding nor the dicta in *Phillips* support the proposition that the tax collector may constitutionally seize a taxpayer's assets without showing some basis for the seizure under circumstances in which the seizure will injure the taxpayer in a way that cannot be adequately remedied by a Tax Court judgment in his favor. Instead it would appear to be entirely consistent with our more recent holdings.

In any event we are satisfied that under the exception to the Anti-Injunction Act described in the *Williams Packing* case this case may be resolved by reference to that Act alone. At the time the District Court dismissed the complaint, the Government had done little more than assert that respondent owed taxes in an amount greater than the value of the property levied—it had alleged that respondent had made an unexplained bank deposit of $18,000 in 1970 and, in a wholly conclusory fashion, that he had received $137,280 in income from selling hashish.[14] Before the taxpayer had an opportunity to inquire into the factual basis for this conclusory allegation, it was not possible to tell whether the Government had any chance of ultimately prevailing. Accordingly, the Court of Appeals properly concluded that the Anti-Injunction Act did not require dismissal of the taxpayer's complaint.

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[14] We do not decide whether the allegation of an $18,000 unexplained bank deposit is insufficient to establish income in that amount—for the purposes of the *Williams Packing* test—for the year 1970. The levies, being greatly in excess of the tax due for 1970 in any event, may not be sustained unless the allegations with respect to respondent's tax liability for 1971 are sufficient.

Moreover, we are satisfied that the standard required by the Anti-Injunction Act is at least as favorable to the taxpayer as that required by the Constitution; and that the standard to be applied by the District Court will therefore not be affected by the resolution of the constitutional issue. The Government may defeat a claim by the taxpayer that its assessment has no basis in fact—and therefore render applicable the Anti-Injunction Act—without resort to oral testimony and cross-examination. Affidavits are sufficient so long as they disclose basic facts from which it appears that the Government may prevail. The Constitution does not invariably require more, *Gerstein* v. *Pugh,* 420 U. S. 103 (1975); *Mathews* v. *Eldridge,* 424 U. S. 319 (1976), and we would not hold that it does where collection of the revenues is involved.

Finally, it seems apparent that if the facts do not even disclose "probable cause," *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601, 607 (1975); *Gerstein* v. *Pugh, supra,* to support the assessment, the Government would certainly be unable to prevail at trial. Thus the *Williams Packing* standard is consistent with the applicable constitutional standard.

We point out also that a preliminary issue would appear to require resolution on remand. Irreparable injury was, of course, quite properly found by the Court of Appeals. At the time of that court's decision, it appeared that respondent Shapiro had been deprived by the levies of the money needed to post bail in Israel and thereby avoid incarceration. However, it would appear that the basis for the Court of Appeals' finding of irreparable injury has since disappeared. Thus, the District Court's preliminary task on remand will be to determine whether this is so and, if so, whether respondent can

establish some other sort of irreparable injury flowing from the levies.[15]

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

I would have thought that when the Commissioner of Internal Revenue, on December 21, 1973, provided respondent Samuel Shapiro with supplements to the responses to the interrogatories, at that time, if not before, he surely satisfied and met all that was required to bring the Anti-Injunction Act, 26 U. S. C. § 7421 (a), and the principle of *Enochs* v. *Williams Packing Co.*, 370 U. S. 1 (1962), into full and effective application. It would follow that the District Court's dismissal of the complaint at that point was entirely proper and should have been affirmed.

Given, however, the result the Court very recently reached in *Laing* v. *United States*, 423 U. S. 161 (1976), the decision today, shored up by what seem to me to be

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[15] We note that it has now been over two years since respondent filed his petition before the Tax Court, and so far as we are informed, there has been no final determination by that court. It may be that for some reason it has been impossible—despite the respondent's best efforts—to obtain a decision by the Tax Court. However, it is also possible that the taxpayer has not vigorously sought such a determination, and has chosen instead to devote most of his energies litigating in the federal courts. If, on remand, the District Court concludes that the absence of a remedy at law at this time is due to respondent's failure to pursue that remedy, then equity will not intervene and the complaint should be dismissed. The inadequacy of his legal remedy would then be due to his own choice not to pursue it.

the inapposite cases cited, *ante*, at 629–630, n. 11, is not unexpected. I am far from certain that the Court is correct, and I am confused by the Court's failure even to cite *Bob Jones University* v. *Simon*, 416 U. S. 725 (1974), and *Commissioner* v. *"Americans United," Inc.*, 416 U. S. 752 (1974), two cases heavily relied upon by the Commissioner here and, I think, of some significance. I observe only that, with *Laing* and the present decision, the Court now has traveled a long way down the road to the emasculation of the Anti-Injunction Act, and down the companion pathway that leads to the blunting of the strict requirements of *Williams Packing* and, now, of Mr. Justice Brandeis' opinion for a unanimous Court in *Phillips* v. *Commissioner*, 283 U. S. 589 (1931). The Court has taken this *Laing-Shapiro* tack, I suspect, as a response to what it deems to be administrative excesses with respect to suspected narcotics operatives who also are, or should be, taxpayers. Whether all this will prove to be stultifying or embarrassing to the collection of the revenues in a more temperate and untroubled time, I do not know. Perhaps, up to a point, the Congress will come to the rescue.

The Court, *ante*, at 624–626, n. 9, demonstrates, of course, that the present case is in a most unsatisfactory posture for review here. It is unfortunate that a case so posed occasions the pronouncement of new and, so far as tax collection efforts are concerned, regressive law.

I would reverse the judgment of the Court of Appeals.

EAST CARROLL PARISH SCHOOL BOARD ET AL. *v.* MARSHALL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73-861. Argued January 21, 1976—Decided March 8, 1976

In adopting a multimember reapportionment plan for a Louisiana parish calling for the at-large election of certain parish officials to remedy malapportionment among the parish wards, the District Court, in the absence of special circumstances dictating the use of such a multimember arrangement, abused its discretion in not initially ordering a single-member reapportionment plan.

485 F. 2d 1297, affirmed.

John F. Ward, Jr., argued the cause and filed a brief for petitioners.

Stanley A. Halpin, Jr., argued the cause for respondent. With him on the brief were *Jack Greenberg* and *Eric Schnapper*.

Brian K. Landsberg argued the cause for the United States as *amicus curiae*. With him on the brief were *Solicitor General Bork, Assistant Attorney General Pottinger, John C. Hoyle,* and *Jessica Dunsay Silver.**

PER CURIAM.

The sole issue raised by this case is how compliance with the one-man, one-vote principle should be achieved in a parish (county) that is admittedly malapportioned.

Plaintiff Zimmer, a white resident of East Carroll Parish, La., brought suit in 1968 alleging that population disparities among the wards of the parish had unconstitu-

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**Paul R. Dimond* and *William E. Caldwell* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae*.

tionally denied him the right to cast an effective vote in elections for members of the police jury [1] and the school board. See *Avery* v. *Midland County*, 390 U. S. 474 (1968). After a hearing the District Court agreed that the wards were unevenly apportioned and adopted a reapportionment plan suggested by the East Carroll police jury calling for the at-large election of members of both the police jury and the school board.[2] The 1969 and 1970 elections were held under this plan.

The proceedings were renewed in 1971 after the District Court, apparently *sua sponte*, instructed the East Carroll police jury and school board to file reapportionment plans revised in accordance with the 1970 census. In response, the jury and board resubmitted the at-large plan. Respondent Marshall was permitted to intervene on behalf of himself and all other black voters in East Carroll. Following a hearing the District Court again

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[1] In Louisiana, the police jury is the governing body of the parish. Its authority includes construction and repair of roads, levying taxes to defray parish expenses, providing for the public health, and performing other duties related to public health and welfare. La. Rev. Stat. Ann. § 33:1236 (1950 and Supp. 1975).

[2] Prior to 1968, Louisiana law prohibited at-large elections of members of police juries and school boards. In July 1968, the Governor of Louisiana approved enabling legislation permitting the at-large election of parish police juries and school boards. La. Laws 1968, Act No. 445, codified at La. Rev. Stat. Ann. §§ 33:1221, 33:1224 (Supp. 1975); La. Laws 1968, Act No. 561, codified at La. Rev. Stat. Ann. §§ 17:71.1–17:71.6 (Supp. 1975).

Both Acts were submitted to the United States Attorney General pursuant to § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, and both were rejected because of their discriminatory effect on Negro voters. See letters, June 26, 1969, and Sept. 10, 1969, from Jerris Leonard, Assistant Attorney General, Civil Rights Division, to Jack P. F. Gremillion, Attorney General of Louisiana. Indeed, East Carroll Parish was cited as exemplifying the dilution in black ballot strength that at-large voting may cause. Letter of Sept. 10, 1969.

approved the multimember arrangement. The intervenor appealed,[3] contending that at-large elections would tend to dilute the black vote in violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965.

Over a dissent, a panel of the Court of Appeals affirmed,[4] but on rehearing en banc, the court reversed.[5] It found clearly erroneous the District Court's ruling that at-large elections would not diminish the black voting strength of East Carroll Parish. Relying upon *White* v. *Regester*, 412 U. S. 755 (1973), it seemingly held that multimember districts were unconstitutional, unless their use would afford a minority greater opportunity for political participation, or unless the use of single-member districts would infringe protected rights.

We granted certiorari, 422 U. S. 1055 (1975), and now affirm the judgment below, but without approval of the constitutional views expressed by the Court of Appeals.[6]

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[3] The original plaintiff, Zimmer, was allowed to withdraw from the case.

[4] *Zimmer* v. *McKeithen*, 467 F. 2d 1381 (CA5 1972).

During pendency of the appeal in the court below, the District Court purported to withdraw its order approving the at-large plan and to substitute in its stead a complex redistricting plan submitted by intervenor Marshall. The Court of Appeals vacated the order on the ground that when the appeal was filed, the District Court lost jurisdiction over the case. *Id.*, at 1382.

[5] *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973).

[6] The Government has filed an *amicus* brief, in which it argues that the preclearance procedures of § 5 of the Voting Rights Act of 1965, must be complied with prior to adoption by a federal district court of a reapportionment plan submitted to it on behalf of a local legislative body that is covered by the Act. This issue was not raised by the petitioners nor did respondent file a cross-petition. In any event, we agree with the Court of Appeals, *Zimmer* v. *McKeithen*, 467 F. 2d, at 1383; *Zimmer* v. *McKeithen*, 485 F. 2d, at 1302 n. 9, that court-ordered plans resulting from equi-

See *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring).

The District Court, in adopting the multimember, at-large reapportionment plan, was silent as to the relative merits of a single-member arrangement. And the Court of Appeals, inexplicably in our view, declined to consider whether the District Court erred under *Connor* v. *Johnson*, 402 U. S. 690 (1971), in endorsing a multimember plan, resting its decision instead upon constitutional grounds. We have frequently reaffirmed the rule that when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances. *Chapman* v. *Meier*, 420 U. S. 1, 17–19 (1975); *Mahan* v. *Howell*, 410 U. S. 315, 333 (1973); *Connor* v. *Williams*, 404 U. S. 549, 551 (1972); *Connor* v. *Johnson*, *supra*, at 692. As the en banc opinion of the Court of Appeals amply demonstrates, no special circumstances here dictate the use of multimember districts. Thus, we hold that in shaping remedial relief the District Court abused

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table jurisdiction over adversary proceedings are not controlled by § 5. Had the East Carroll police jury reapportioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required. *Connor* v. *Waller*, 421 U. S. 656 (1975). However, in submitting the plan to the District Court, the jury did not purport to reapportion itself in accordance with the 1968 enabling legislation, see n. 2, *supra*, and statutes cited therein, which permitted police juries and school boards to adopt at-large elections. App. 56. Moreover, since the Louisiana enabling legislation was opposed by the Attorney General of the United States under § 5 of the Voting Rights Act, the jury did not have the authority to reapportion itself. See n. 2, *supra;* Tr. of Oral Arg. 13–14, 31–32, 43–44. Since the reapportionment scheme was submitted and adopted pursuant to court order, the preclearance procedures of § 5 do not apply. *Connor* v. *Johnson*, 402 U. S. 690, 691 (1971).

its discretion in not initially ordering a single-member reapportionment plan.

On this basis, the judgment is

Affirmed.

MR. CHIEF JUSTICE BURGER, concurring.

I consider it unnecessary to reach the question discussed, *ante*, at 638–639, n. 6. It was, as the Court observes in n. 6, "not raised by the petitioners, nor did respondent file a cross-petition." The scope of § 5 of the Voting Rights Act is an important matter, and I would not undertake to express any view on what the Court discusses by way of dicta in n. 6.

BUCOLO ET AL. *v.* ADKINS, CHIEF JUSTICE, ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

No. 75-369. Decided March 8, 1976

Where further proceedings pursuant to an information charging petitioners with violating Florida's obscenity statute were foreclosed by this Court's judgment summarily reversing the Florida Supreme Court's affirmance of petitioners' convictions, the latter court, by remanding the case to the trial court for further proceedings, failed to effectuate this Court's judgment, and its failure to do so was not cured by the intervening exercise of prosecutorial discretion in *nolle prossing* the charges. Accordingly, petitioners' motion for leave to file a petition to mandamus the Florida Supreme Court to conform its decision to this Court's mandate is granted.

See 316 So. 2d 551.

PER CURIAM.

Petitioners were convicted in the Circuit Court of Palm Beach County, Fla., of publishing certain comic strips and pictures in violation of the Florida obscenity statute.[1] On appeal, the Supreme Court of Florida affirmed.[2] In April 1975, we granted certiorari and summarily reversed the judgment of the Supreme Court of Florida, citing *Jenkins* v. *Georgia,* 418 U. S. 153 (1974), and *Kois* v. *Wisconsin,* 408 U. S. 229 (1972).[3]

The Supreme Court of Florida sent the case to the trial court "for further proceedings in which the standards established in *Miller* v. *California* [4] can be applied." [5] Petitioners thereupon applied to us for a

[1] Fla. Stat. Ann. § 847.011 (Supp. 1975).

[2] *Bucolo* v. *State,* 303 So. 2d 329 (1974).

[3] *Bucolo* v. *Florida,* 421 U. S. 927.

[4] 413 U. S. 15 (1973).

[5] *Bucolo* v. *State,* 316 So. 2d 551 (1975).

writ of mandamus directing respondents "to vacate and expunge from the record" the opinion and mandate on remand of the Supreme Court of Florida. They complained that, in subjecting them to a second trial, the state court ignored this Court's determination that the published materials were not obscene.[6]

On November 4, 1975, while petitioners' request for mandamus was pending before us, the State Attorney of Palm Beach County, at the direction of the State's Attorney General, *nolle prossed* the charges. Florida follows the common law with respect to *nolle prosequi* and vests in its Attorney General exclusive discretion to determine that the State is "unwilling to prosecute." See 9 Fla. Jur., Criminal Law § 378 (1972). *Nolle prosequi,* if entered before jeopardy attaches, neither operates as an acquittal nor prevents further prosecution of the offense. See *id.,* § 438; *Smith* v. *State,* 135 Fla. 835, 186 So. 203 (1939). We are informed by the Florida Attorney General that, in the instant case, Florida's speedy-trial rule precludes renewed prosecution of petitioners. Therefore, the threatened injury which impelled petitioners to invoke our extraordinary jurisdiction would appear to be obviated. But, petitioners take the position that the entry of the *nolle prosequi* does not eliminate the necessity that we act to insure that the Supreme Court of Florida will conform its decision to the determination reached in this Court.

Petitioners further contend that in these circumstances the prosecutor's exercise of discretionary authority to

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[6] In his response to petitioners' request for mandamus, the Attorney General of Florida concedes that "there is no question but that this Court in reversing [p]etitioners' conviction on April 21, 1975, by referring to [*Jenkins* and *Kois*], conclusively determined that the materials disseminated by petitioners were not obscene as a matter of law." He urges us, however, to deny relief on other grounds.

forgo further prosecution serves to deprive them of the exoneration to which this Court's reversal otherwise entitles them. They find support for this claim in the language of the *nolle prosequi* itself, which is, presumably, now a part of the permanent trial court record in this case. That document erroneously suggests that further proceedings applying *Miller* standards were ordered by this Court.[7] It also suggests that the State had become unwilling to prosecute solely as a result of the passage of time. We agree with petitioners that nothing in the state-court record, as it now stands, recognizes that the State was foreclosed by this Court's decision from seeking to convict petitioners of obscenity violations. We are unable to dismiss as insignificant petitioners' plaint that the judgment of the Supreme Court of Florida, as it now stands, obscures this Court's favorable adjudication on the merits—an adjudication which requires full recognition by the state courts in order effectively to dispel any opprobrium resulting from the accusation of obscenity.

Observation of the disposition of this case following our summary reversal reveals that the Supreme Court of Florida has attributed to this Court a decision which it never made. Further proceedings pursuant to the information charging petitioners with violating Florida's obscenity statute were clearly foreclosed. In that circumstance, the state court's failure to give effect to that judgment was not cured by the intervening exercise of prose-

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[7] Petitioners direct our attention to the document filed by the prosecutor in support of his decision to *nolle prosse* the charges. It contains the following notation:

"SUPREME COURT OF THE UNITED STATES REMANDED THIS CASE UNDER GUIDELINES OF *MILLER* V. *CALIFORNIA*. THIS CASE NOLLE PROSSED USING PROSECUTORIAL DISCRETION REGARDING ITS AGE AND LOCATION OF WITNESSES."

cutorial discretion. Accordingly, the motion for leave to file a petition for a writ of mandamus ordering the Supreme Court of Florida to conform its decision to our mandate is granted. Assuming as we do that the Supreme Court of Florida will conform to the disposition we now make, we do not now issue the writ of mandamus. *Deen* v. *Hickman*, 358 U. S. 57 (1958).

MR. JUSTICE STEVENS, with whom MR. JUSTICE REHNQUIST joins, dissenting.

In *Deen* v. *Hickman*, 358 U. S. 57, it was necessary to require the Texas Supreme Court to conform its decision to our mandate in order to make sure that further proceedings in the underlying litigation would be properly conducted. In this case no matter what we do, there will be no further proceedings in the underlying litigation. The circumstances recited in the opinion of the Court, therefore, would not justify the issuance of an extraordinary writ. Since I would not vote in favor of such a writ, I would also deny the motion for leave to file.

McCARTHY *v.* PHILADELPHIA CIVIL SERVICE COMMISSION

ON APPEAL TO THE COMMONWEALTH COURT OF PENNSYLVANIA, EASTERN DISTRICT

No. 75-783. Decided March 22, 1976

Philadelphia municipal regulation requiring city employees to be residents of the city *held* to be constitutional as a bona fide continuing residence requirement and not to violate the right of interstate travel of appellant, whose employment as a city fireman was terminated under the regulation because he moved his residence from Philadelphia to New Jersey.

19 Pa. Commw. 383, 339 A. 2d 634, affirmed.

PER CURIAM.

After 16 years of service, appellant's employment in the Philadelphia Fire Department was terminated because he moved his permanent residence from Philadelphia to New Jersey in contravention of a municipal regulation requiring employees of the city of Philadelphia to be residents of the city. He challenges the constitutionality of the regulation and the authorizing ordinances [1] as violative of his federally protected right of interstate travel. The regulation was sustained by the Commonwealth Court of Pennsylvania [2] and review was denied by the Pennsylvania Supreme Court.[3] His timely appeal is here pursuant to 28 U. S. C. § 1257 (2).

The Michigan Supreme Court held that Detroit's sim-

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[1] § 7-401 (u) of the Philadelphia Home Rule Charter of 1951; § 20-101 of the Philadelphia Code (as amended); and § 30.01 of the Philadelphia Civil Service Regulations.

[2] 19 Pa. Commw. 383, 339 A. 2d 634 (1975).

[3] In an unreported order entered on September 2, 1975, that court denied a petition for review.

ilar requirement for police officers was not irrational and did not violate the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.[4] We dismissed the appeal from that judgment because no substantial federal question was presented. *Detroit Police Officers Assn.* v. *City of Detroit*, 405 U. S. 950 (1972). We have therefore held that this kind of ordinance is not irrational. *Hicks* v. *Miranda*, 422 U. S. 332, 343–345 (1975); see *Wardwell* v. *Board of Education of Cincinnati*, 529 F. 2d 625, 628 (CA6 1976).

We have not, however, specifically addressed the contention made by appellant in this case that his constitutionally recognized right to travel interstate as defined in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); and *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974), is impaired. Each of those cases involved a statutory requirement of residence in the State for at least one year before becoming eligible either to vote, as in *Dunn*, or to receive welfare benefits, as in *Shapiro* and *Memorial Hospital*.[5] Neither in those cases, nor in any others, have we questioned the validity of a condition placed upon municipal employment that a person be a resident *at the time* of his application.[6] In this case appellant claims a constitutional right to be employed by the city of Philadelphia

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[4] *Detroit Police Officers Assn.* v. *City of Detroit*, 385 Mich. 519, 190 N. W. 2d 97 (1971).

[5] Although there is a durational residence requirement in the Philadelphia ordinances, appellant does not have standing to challenge that requirement.

[6] Nor did any of those cases involve a public agency's relationship with its own employees which, of course, may justify greater control than that over the citizenry at large. Cf. *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968); *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973); *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973).

while he is living elsewhere.[7] There is no support in our cases for such a claim.

We have previously differentiated between a requirement of continuing residency and a requirement of prior residency of a given duration. Thus in *Shapiro, supra,* at 636, we stated: "The residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites." And in *Memorial Hospital, supra,* at 255, quoting *Dunn, supra,* at 342 n. 13, the Court explained that *Shapiro* and *Dunn* did not question "'the validity of appropriately defined and uniformly applied bona fide residence requirements.'"

This case involves that kind of bona fide continuing-residence requirement. The judgment of the Commonwealth Court of Pennsylvania is therefore affirmed.

THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE BLACKMUN would note probable jurisdiction and set the case for argument.

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[7] Appellant seeks review of other alleged errors as if presented in a petition for a writ of certiorari. We decline to review those issues.

GARNER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–100. Argued November 4, 1975—Decided March 23, 1976

Petitioner's income tax returns, in which he revealed himself to be a gambler, were introduced in evidence, over his Fifth Amendment objection, as proof of the federal gambling conspiracy offense with which he was charged. *Held:* Petitioner's privilege against compulsory self-incrimination was not violated. Since petitioner made incriminating disclosures on his tax returns instead of claiming the privilege, as he had the right to do, his disclosures were not compelled incriminations. Here, where there is no factor depriving petitioner of the free choice to refuse to answer, the general rule applies that if a witness does not claim the privilege his disclosures will not be considered as having been "compelled" within the meaning of the Fifth Amendment. *United States* v. *Sullivan*, 274 U. S. 259. *Miranda* v. *Arizona*, 384 U. S. 436; *Mackey* v. *United States*, 401 U. S. 667; *Garrity* v. *New Jersey*, 385 U. S. 493, distinguished. Pp. 650–655.

501 F. 2d 228, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post*, p. 666. STEVENS, J., took no part in the consideration or decision of the case.

Burton Marks argued the cause for petitioner. With him on the brief was *Jonathan K. Golden.*

Deputy Solicitor General Jones argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Thornburgh, Deputy Solicitor General Frey, Jerome M. Feit,* and *Frederick W. Read III.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case involves a nontax criminal prosecution in which the Government introduced petitioner's income tax returns to prove the offense against him. The question is whether the introduction of this evidence, over petitioner's Fifth Amendment objection, violated the privilege against compulsory self-incrimination when petitioner made the incriminating disclosures on his returns instead of then claiming the privilege.

I

Petitioner, Roy Garner, was indicted for a conspiracy involving the use of interstate transportation and communication facilities to "fix" sporting contests, to transmit bets and information assisting in the placing of bets, and to distribute the resultant illegal proceeds. 18 U. S. C. §§ 371, 224, 1084, 1952.[1] The Government's case was that conspirators bet on horse races either having fixed them or while in possession of other information unavailable to the general public. Garner's role in this scheme was the furnishing of inside information. The case against him included the testimony of other conspirators and telephone toll records that showed calls from Garner to other conspirators before various bets were placed.

The Government also introduced, over Garner's Fifth Amendment objection, the Form 1040 income tax returns that Garner had filed for 1965, 1966, and 1967. In the 1965 return Garner had reported his occupation as "pro-

[1] Garner was also indicted for aiding and abetting the violation of 18 U. S. C. § 1084, the substantive offense involving transmission of bets and betting information. The trial judge acquitted him on this count at the close of the Government's case.

fessional gambler," and in each return he reported substantial income from "gambling" or "wagering." The prosecution relied on Garner's familiarity with "the business of wagering and gambling," as reflected in his returns, to help rebut his claim that his relationships with other conspirators were innocent ones.

The jury returned a guilty verdict. Garner appealed to the Court of Appeals for the Ninth Circuit, contending that the privilege against compulsory self-incrimination entitled him to exclude the tax returns despite his failure to claim the privilege on the returns instead of making disclosures. Sitting en banc the Court of Appeals held that Garner's failure to assert the privilege on his returns defeated his Fifth Amendment claim. 501 F. 2d 236.[2] We agree.

II

In *United States* v. *Sullivan*, 274 U. S. 259 (1927), the Court held that the privilege against compulsory self-incrimination is not a defense to prosecution for failing to file a return at all. But the Court indicated that the privilege could be claimed against specific disclosures sought on a return, saying:

> "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." *Id.*, at 263.[3]

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[2] The panel of the Court of Appeals that originally heard the case had accepted Garner's contention and reversed, one judge dissenting. 501 F. 2d 228. The en banc court affirmed the conviction by a 7-to-5 vote.

[3] In *Sullivan*, Mr. Justice Holmes, writing for the Court, said: "It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should

Had Garner invoked the privilege against compulsory self-incrimination on his tax returns in lieu of supplying the information used against him, the Internal Revenue Service could have proceeded in either or both of two ways. First, the Service could have sought to have Garner criminally prosecuted under § 7203 of the Internal Revenue Code of 1954 (Code), 26 U. S. C. § 7203, which proscribes, among other things, the willful failure to make a return.[4] Second, the Service could have sought to complete Garner's returns administratively "from [its] own knowledge and from such information as [it could] obtain through testimony or otherwise." 26 U. S. C. § 6020 (b)(1). Section 7602 (2) of the Code authorizes the Service in such circumstances to summon the taxpayer to appear and to produce records or give testimony. 26

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have tested it in the return so that it could be passed upon." 274 U. S., at 263–264.

We have no occasion in this case to decide what types of information are so neutral that the privilege could rarely, if ever, be asserted to prevent their disclosure. See also *California* v. *Byers*, 402 U. S. 424 (1971). Further, the claims of privilege we consider here are only those justified by a fear of self-incrimination other than under the tax laws. Finally, nothing we say here questions the continuing validity of *Sullivan*'s holding that returns must be filed.

[4] Title 26 U. S. C. § 7203 reads in full:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

U. S. C. § 7602 (2).[5] If Garner had persisted in his claim when summoned, the Service could have sued for enforcement in district court, subjecting Garner to the threat of the court's contempt power. 26 U. S. C. § 7604.[6]

Given *Sullivan*, it cannot fairly be said that taxpayers are "volunteers" when they file their tax returns. The Government compels the filing of a return much as it compels, for example, the appearance of a "witness" [7] before a grand jury. The availability to the Service of § 7203 prosecutions and the summons procedure also induces taxpayers to disclose unprivileged information on their

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[5] Title 26 U. S. C. § 7602 reads in part:

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . , or collecting any such liability, the Secretary or his delegate is authorized—

. . . . . .

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . ."

[6] Title 18 U. S. C. § 6004 would appear to authorize the Service, as an alternative to an enforcement suit, to order a summoned taxpayer to make disclosures in exchange for immunity. We are informed, however, that it has not been the Service's practice to utilize § 6004. Brief for United States 19, and n. 11.

[7] The term "witness" is used herein to identify one who, at the time disclosures are sought from him, is not a defendant in a criminal proceeding. The more frequent situations in which a witness' disclosures are compelled, subject to Fifth Amendment rights, include testimony before a grand jury, in a civil or criminal case or proceeding, or before a legislative or administrative body possessing subpoena power.

returns. The question, however, is whether the Government can be said to have compelled Garner to incriminate himself with regard to specific disclosures made on his return when he could have claimed the Fifth Amendment privilege instead.

III

We start from the fundamental proposition:

> "[A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar* v. *United States,* 406 U. S. 441 (1972). Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution. *Bram* v. *United States,* [168 U. S. 532 (1897)]; *Boyd* v. *United States,* [116 U. S. 616 (1886)]." *Lefkowitz* v. *Turley,* 414 U. S. 70, 78 (1973).

See *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 57 n. 6 (1964).

Because the privilege protects against the use of compelled statements as well as guarantees the right to remain silent absent immunity, the inquiry in a Fifth Amendment case is not ended when an incriminating statement is made in lieu of a claim of privilege. Nor, however, is failure to claim the privilege irrelevant.

The Court has held that an individual under compulsion to make disclosures as a witness who revealed information instead of claiming the privilege lost the benefit of the privilege. *United States* v. *Kordel,* 397 U. S. 1, 7–10 (1970). Although *Kordel* appears to be the only square holding to this effect, the Court frequently has recognized the principle in dictum. *Maness* v. *Meyers,* 419 U. S. 449, 466 (1975); *Rogers* v. *United States,* 340

U. S. 367, 370–371 (1951); *Smith* v. *United States*, 337 U. S. 137, 150 (1949); *United States* v. *Monia*, 317 U. S. 424, 427 (1943); *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 112–113 (1927).[8] These decisions stand for the proposition that, in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not "compelled" him to incriminate himself.[9]

> "The Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he

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[8] The Court also has held, analogously, that a witness loses the privilege by failing to claim it promptly even though the information being sought remains undisclosed when the privilege is claimed. *United States* v. *Murdock*, 284 U. S. 141, 148 (1931), disapproved on other grounds, *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964); see *Rogers* v. *United States*, 340 U. S., at 371.

[9] This conclusion has not always been couched in the language used here. Some cases have indicated that a nonclaiming witness has "waived" the privilege, see, *e. g.*, *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113 (1927). Others have indicated that such a witness testifies "voluntarily," see, *e. g.*, *Rogers* v. *United States*, *supra*, at 371. Neither usage seems analytically sound. The cases do not apply a "waiver" standard as that term was used in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and we recently have made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 222–227, 235–240, 246–247 (1973). Moreover, it seems desirable to reserve the term "waiver" in these cases for the process by which one affirmatively renounces the protection of the privilege, see, *e. g.*, *Smith* v. *United States*, 337 U. S. 137, 150 (1949). The concept of "voluntariness" is related to the concept of "compulsion." But it may promote clarity to use the latter term in cases where disclosures are required in the face of a claim of privilege, while reserving "voluntariness" for the concerns discussed in Part IV, *infra*, at 656–665, where we consider whether some factor prevents a taxpayer desiring to claim the privilege from doing so.

must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States* v. *Monia, supra,* at 427 (footnote omitted).

In their insistence upon a claim of privilege, *Kordel* and the older witness cases reflect an appropriate accommodation of the Fifth Amendment privilege and the generally applicable principle that governments have the right to everyone's testimony. *Mason* v. *United States,* 244 U. S. 362, 364–365 (1917); see, *e. g., Branzburg* v. *Hayes,* 408 U. S. 665, 688 (1972); *Kastigar* v. *United States,* 406 U. S. 441, 443–445 (1972). Despite its cherished position, the Fifth Amendment addresses only a relatively narrow scope of inquiries. Unless the government seeks testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent immunity does not arise. An individual therefore properly may be compelled to give testimony, for example, in a noncriminal investigation of himself. See, *e. g., Gardner* v. *Broderick,* 392 U. S. 273, 278 (1968). Unless a witness objects, a government ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating. Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled.

In addition, the rule that a witness must claim the privilege is consistent with the fundamental purpose of the Fifth Amendment—the preservation of an adversary system of criminal justice. See *Tehan* v. *United States ex rel. Shott,* 382 U. S. 406, 415 (1966). That system is undermined when a government deliberately seeks to

avoid the burdens of independent investigation by compelling self-incriminating disclosures. In areas where a government cannot be said to be compelling such information, however, there is no such circumvention of the constitutionally mandated policy of adversary criminal proceedings. Cf. *Counselman* v. *Hitchcock,* 142 U. S. 547, 562–565 (1892); *California* v. *Byers,* 402 U. S. 424, 456–458 (1971) (Harlan, J., concurring in judgment).

IV

The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimony of a "witness," as that term is used herein. Since Garner disclosed information on his returns instead of objecting, his Fifth Amendment claim would be defeated by an application of the general requirement that witnesses must claim the privilege. Garner, however, resists the application of that requirement, arguing that incriminating disclosures made in lieu of objection are "compelled" in the tax-return context. He relies specifically on three situations in which incriminatory disclosures have been considered compelled despite a failure to claim the privilege.[10] But in each of these narrowly defined situations, some factor not present here made inappropriate the general rule that the privilege

[10] These arguments were in fact advanced in the dissent from the en banc decision below, which Garner adopted as his brief on the self-incrimination issue. Brief for Petitioner 8. Garner's brief itself principally advances two other claims of error. The facts underlying these claims were not presented in the petition for certiorari, see this Court's Rule 23 (1)(e), which alone would have merited a denial of a petition not containing the self-incrimination claim. Rule 23 (4). Further, these contentions were not deemed of sufficient merit to warrant discussion below. In those circumstances we consider it inappropriate to reach them.

must be claimed. In each situation the relevant factor was held to deny the individual a "free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California,* 314 U. S. 219, 241 (1941). For the reasons stated below, we conclude that no such factor deprived Garner of that free choice.

A

Garner relies first on cases dealing with coerced confessions, *e. g., Miranda* v. *Arizona,* 384 U. S. 436 (1966), where the Court has required the exclusion of incriminating statements unless there has been a knowing and intelligent waiver of the privilege regardless of whether the privilege has been claimed. *Id.,* at 467–469, 475–477. Garner notes that it has not been shown that his failure to claim the privilege was such a waiver.

It is evident that these cases have little to do with disclosures on a tax return. The coerced-confession cases present the entirely different situation of custodial interrogation. See *id.,* at 467. It is presumed that without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent. See *ibid.* At the same time, the inquiring government is acutely aware of the potentially incriminatory nature of the disclosures sought. Thus, any pressures inherent in custodial interrogation are compulsions to incriminate, not merely compulsions to make unprivileged disclosures. Because of the danger that custodial interrogation posed to the adversary system favored by the privilege, the Court in *Miranda* was impelled to adopt the extraordinary safeguard of excluding statements made without a knowing and intelligent waiver of the privilege. *Id.,* at 467, 475–476; see *Michigan* v. *Mosley,* 423 U. S. 96, 97 (1975); *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 246–247 (1973). Nothing in this case suggests the need for a similar pre-

sumption that a taxpayer makes disclosures on his return rather than claims the privilege because his will is overborne. In fact, a taxpayer, who can complete his return at leisure and with legal assistance, is even less subject to the psychological pressures at issue in *Miranda* than a witness who has been called to testify in judicial proceedings. Cf. *United States* v. *Kordel*, 397 U. S., at 9–10; *Miranda*, *supra*, at 461.

B

Garner relies next on *Mackey* v. *United States*, 401 U. S. 667 (1971), the relevance of which can be understood only in light of *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968). In the latter cases the Court considered whether the Fifth Amendment was a defense in prosecutions for failure to file the returns required of gamblers in connection with the federal occupational and excise taxes on gambling. The Court found that any disclosures made in connection with the payment of those taxes tended to incriminate because of the pervasive criminal regulation of gambling activities. *Marchetti*, *supra*, at 48–49; *Grosso*, *supra*, at 66–67. Since submitting a claim of privilege in lieu of the returns also would incriminate, the Court held that the privilege could be exercised by simply failing to file.[11]

[11] As we have noted, the privilege is an exception to the general principle that the Government has the right to everyone's testimony. A corollary to that principle is that the claim of privilege ordinarily must be presented to a "tribunal" for evaluation at the time disclosures are initially sought. See *Albertson* v. *SACB*, 382 U. S. 70, 78–79 (1965); *Vajtauer* v. *Commissioner of Immigration*, 273 U. S., at 113; *Mason* v. *United States*, 244 U. S. 362, 364–365 (1917). This early evaluation of claims allows the Government to compel evidence if the claim is invalid or if immunity is granted and therefore assures that the Government obtains all the information to which it is entitled. In the gambling tax cases, however, making a claim of privi-

In *Mackey*, the disclosures required in connection with the gambling excise tax had been made before *Marchetti* and *Grosso* were decided. Mackey's returns were introduced in a criminal prosecution for income tax evasion. Although a majority of the Court considered the disclosures on the returns to have been compelled incriminations, 401 U. S., at 672 (plurality opinion); *id.*, at 704–705 (BRENNAN, J., concurring in judgment); *id.*, at 713 (Douglas, J., dissenting), Mackey was not immunized against their use because *Marchetti* and *Grosso* were held nonretroactive. 401 U. S., at 674–675 (plurality opinion); *id.*, at 700–701 (Harlan, J., concurring in judgment).[12] Garner assumes that if Mackey had made his disclosures after *Marchetti* and *Grosso*, they could not have been used against him. He then concludes that since Mackey would have been privileged to file no returns at all, *Mackey* stands for the proposition that an objection at trial always suffices to preserve the privilege even if disclosures have been made previously.

Assuming that Garner otherwise reads *Mackey* correctly,[13] we do not think that case should be applied in

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lege when the disclosures were requested, *i. e.*, when the returns were due, would have identified the claimant as a gambler. The Court therefore forgave the usual requirement that the claim of privilege be presented for evaluation in favor of a "claim" by silence. See *Marchetti*, 390 U. S., at 50. Nonetheless, it was recognized that one who "claimed" the privilege by refusing to file could be required subsequently to justify his claim of privilege. See *id.*, at 61. If a particular gambler would not have incriminated himself by filing the tax returns, the privilege would not justify a failure to file.

[12] MR. JUSTICE BRENNAN, joined by MR. JUSTICE MARSHALL, concurred in the judgment on the ground that the compelled disclosure of the amount of Mackey's gambling income could be used in a prosecution for income tax evasion. See 401 U. S., at 702.

[13] It does not follow necessarily that a taxpayer would be immunized against use of disclosures made on gambling tax returns when the Fifth Amendment would have justified a failure to file at all. If *Marchetti* and *Grosso* had been held retroactive, immunization

this context. The basis for the holdings in *Marchetti* and *Grosso* was that the occupational and excise taxes on gambling required disclosures only of gamblers, the great majority of whom were likely to incriminate themselves by responding. *Marchetti, supra,* at 48–49, 57; *Grosso, supra,* at 66–68. Therefore, as in the coerced-confession cases, any compulsion to disclose was likely to compel self-incrimination.[14] Garner is differently situated. Although he disclosed himself to be a gambler, federal income tax returns are not directed at those " 'inherently suspect of criminal activities.' " *Marchetti, supra,* at 52. As noted in *Albertson* v. *SACB,* 382 U. S. 70, 79 (1965), "the questions in [an] income tax return [are] neutral on their face and directed at the public at

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might have been appropriate in Mackey's case. But at the time Mackey filed there was in fact no privilege not to file. Not only had *Marchetti* and *Grosso* not yet been decided, but *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955), previously had held that the privilege was not a defense to prosecution for failure to file the occupational tax returns. Mackey therefore was compelled to file his returns, thereby necessarily identifying himself as a gambler and thus risking self-incrimination. Accordingly, there were two related reasons to view the disclosures made in *Mackey* as compelled incriminations. The first was the inherently incriminating nature of the information demanded by the Government. See *supra,* at 658. The second was the gambler's inability to claim the privilege by refusing to file at the time Mackey's disclosures were required. Cf. *Mackey,* 401 U. S., at 704 (BRENNAN, J., concurring in judgment); *Leary* v. *United States,* 395 U. S. 6, 27–28 (1969); *Grosso,* 390 U. S., at 70–71. In the case of gambling tax returns filed after *Marchetti* and *Grosso,* the second factor would not be present.

[14] *Marchetti* and *Grosso,* of course, removed the threat of a criminal conviction when one validly claims the privilege by failing to file gambling tax returns. We do not pause here to consider whether there may be circumstances that would deprive a gambler of the free choice to claim the privilege by failing to file such returns, and therefore allow him to exclude a completed gambling tax return by claiming the privilege at trial. Cf. n. 13, *supra.*

large." The great majority of persons who file income tax returns do not incriminate themselves by disclosing their occupation. The requirement that such returns be completed and filed simply does not involve the compulsion to incriminate considered in *Mackey*.[15]

C

Garner's final argument relies on *Garrity* v. *New Jersey*, 385 U. S. 493 (1967). There policemen summoned during an investigation of police corruption were informed that they could claim the privilege but that they would be discharged for doing so. The disclosures they made were introduced against them in subsequent criminal prosecutions. The Court held that the penalty of discharge for reliance on the privilege foreclosed a free choice to remain silent, and therefore had the effect of compelling the incriminating testimony given by the policemen. Garner notes that a taxpayer who claims the privilege on his return faces the possibility of a criminal prosecution under § 7203 for failure to make a return. He argues that the possibility of prosecution, like the threat of discharge in *Garrity*, compels a taxpayer to make incriminating disclosures rather than claim the privilege. This contention is not entirely without force, but we find it unpersuasive.

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[15] Garner contends that whatever the case may be with regard to taxpayers in general, a gambler who might be incriminated by revealing his occupation cannot claim the privilege on the return effectively. This contention stems from the fact that certain specialized tax calculations are required only of gamblers. See § 165 (d) of the Code, 26 U. S. C. § 165 (d); Recent Cases, 86 Harv. L. Rev. 914, 916 n. 13 (1973). Garner argues that the process of claiming the privilege with respect to these calculations will reveal a gambler's occupation. We need not address this contention, since Garner found it unnecessary to make any such special calculations. 501 F. 2d, at 237 n. 3.

The policemen in *Garrity* were threatened with punishment for a concededly valid exercise of the privilege, but one in Garner's situation is at no such disadvantage. A § 7203 conviction cannot be based on a valid exercise of the privilege. This is implicit in the dictum of *United States* v. *Sullivan*, 274 U. S. 259 (1927), that the privilege may be claimed on a return.[16] Furthermore, the Court has held that an individual summoned by the Service to provide documents or testimony can rely on the privilege to defend against a § 7203 prosecution for failure to "supply any information." See *United States* v. *Murdock*, 290 U. S. 389 (1933) (*Murdock II*); *United States* v. *Murdock*, 284 U. S. 141 (1931) (*Murdock I*), disapproved on other grounds, *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964).[17] The Fifth Amendment itself guaran-

[16] Garner contends that *California* v. *Byers*, 402 U. S. 424 (1971), cast doubt on *Sullivan's* dictum. The Court held in *Byers* that the privilege against compulsory self-incrimination was not violated by a statute requiring motorists involved in automobile accidents to stop and identify themselves. Garner argues that *Byers* suggests that governments always can compel answers to neutral regulatory inquiries in a self-reporting scheme and that the protection of the Fifth Amendment should be afforded in such cases solely through use immunity.

We cannot agree that *Byers* undercut *Sullivan's* dictum. Although there was not a majority of the Court for any rationale for the *Byers* holding, the Court addressed there only the basic requirement that one's name and address be disclosed. The opinions upholding the requirement suggested that the privilege might be claimed appropriately against other questions. 402 U. S., at 434 n. 6 (plurality opinion); *id.*, at 457–458 (Harlan, J., concurring in judgment). *Byers* is thus analogous to *Sullivan*, holding only that requiring certain basic disclosures fundamental to a neutral reporting scheme does not violate the privilege.

[17] The *Murdock* cases involved predecessor statutes to § 7203, but they were identical to it in all material respects. See Internal Revenue Act of 1926, § 1265, 44 Stat. 850–851; Internal Revenue Act of 1928, § 146 (a), 45 Stat. 835.

tees the taxpayer's insulation against liability imposed on the basis of a valid and timely claim of privilege, a protection broadened by § 7203's statutory standard of "willfulness." [18]

Since a valid claim of privilege cannot be the basis for a § 7203 conviction, Garner can prevail only if the possibility that a claim made on the return will be tested in a criminal prosecution suffices in itself to deny him freedom to claim the privilege. He argues that it does so, noting that because of the threat of prosecution under § 7203 a taxpayer contemplating a claim of privilege on his return faces a more difficult choice than does a witness contemplating a claim of privilege in a judicial proceeding. If the latter claims the protection of the Fifth Amendment, he receives a judicial ruling at that time on the validity of his claim, and he has an opportunity to reconsider it before being held in contempt for refusal to answer. Cf. *Maness* v. *Meyers*, 419 U. S., at 460–461.

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[18] Because § 7203 proscribes "willful" failures to make returns, a taxpayer is not at peril for every erroneous claim of privilege. The Government recognizes that a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith. This concession simply reflects our holding in *Murdock II*. There Murdock's claim of privilege was considered unjustified (because of the holding in *Murdock I* disapproved in *Murphy* v. *Waterfront Comm'n*). But the Court recognized that "good faith" in its assertion would entitle Murdock to acquittal.

"[T]he Government, . . . we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent, in good faith, to exercise a privilege granted the witness by the Constitution." 290 U. S., at 397.

See *United States* v. *Bishop*, 412 U. S. 346 (1973). In this respect, the protection for the taxpayer in a § 7203 prosecution is broader than that for a witness who risks contempt to challenge a judicial order to disclose. In the latter case, a mere erroneous refusal to disclose warrants a sanction. See *Maness* v. *Meyers*, 419 U. S. 449, 460–461 (1975).

A § 7203 prosecution, however, may be brought without a preliminary judicial ruling on a claim of privilege that would allow the taxpayer to reconsider.[19]

In essence, Garner contends that the Fifth Amendment guarantee requires such a preliminary-ruling procedure for testing the validity of an asserted privilege. It may be that such a procedure would serve the best interests of the Government as well as of the taxpayer, cf. *Emspak* v. *United States*, 349 U. S. 190, 213–214 (1955) (Harlan, J., dissenting), but we certainly cannot say that the Constitution requires it. The Court previously has considered Fifth Amendment claims in the context of a criminal prosecution where the defendant did not have the benefit of a preliminary judicial ruling on a claim of privilege. It has never intimated that such a procedure is other than permissible. Indeed, the Court has given some measure of endorsement to it. In *Murdock I*, *supra*, an individual was prosecuted under predecessors of § 7203 for refusing to make disclosures after being summoned by the Bureau of Internal Revenue.[20] In this Court he contended, apparently on statutory grounds, that there could be no prosecution without a prior judicial enforcement suit to allow presentation of his claim of privilege to a court for a preliminary ruling. The Court said:

> "While undoubtedly the right of a witness to refuse to answer lest he incriminate himself may be tested in proceedings to compel answer, there is no support for the contention that there must be such a deter-

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[19] The Government advised us at oral argument that a claim of privilege would stimulate rulings by the Service. It is doubtful, therefore, that a claimant would find himself prosecuted with no prior indication that the Service considered his claim invalid. The claimant, however, would not have a judicial assessment of his claim.

[20] See n. 17, *supra*.

> mination of that question before prosecution for the willful failure so denounced." 284 U. S., at 148.

See also *Quinn* v. *United States*, 349 U. S. 155, 167–170 (1955); *Emspak* v. *United States, supra*, at 213–214 (Harlan, J., dissenting).

We are satisfied that *Murdock I* states the constitutional standard. What is at issue here is principally a matter of timing and procedure. As long as a valid and timely claim of privilege is available as a defense to a taxpayer prosecuted for failure to make a return, the taxpayer has not been denied a free choice to remain silent merely because of the absence of a preliminary judicial ruling on his claim. We therefore do not agree that Garner was deterred from claiming the privilege in the sense that was true of the policemen in *Garrity*.

V

In summary, we conclude that since Garner made disclosures instead of claiming the privilege on his tax returns, his disclosures were not compelled incriminations.[21] He therefore was foreclosed from invoking the privilege when such information was later introduced as evidence against him in a criminal prosecution.

The judgment is

Affirmed.

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[21] No language in this opinion is to be read as allowing a taxpayer desiring the protection of the privilege to make disclosures concurrently with a claim of privilege and thereby to immunize himself against the use of such disclosures. If a taxpayer desires the protection of the privilege, he must claim it instead of making disclosures. Any other rule would deprive the Government of its choice between compelling the evidence from the claimant in exchange for immunity and avoiding the burdens of immunization by obtaining the evidence elsewhere. See *Mackey* v. *United States*, 401 U. S., at 711–713 (BRENNAN, J., concurring in judgment).

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

I agree with the Court that petitioner, having made incriminating disclosures on his income tax returns rather than having claimed the privilege against self-incrimination, cannot thereafter assert the privilege to bar the introduction of his returns in a criminal prosecution. I disagree, however, with the Court's rationale, which is far broader than is either necessary or appropriate to dispose of this case.

This case ultimately turns on a simple question—whether the possibility of being prosecuted under 26 U. S. C. § 7203 for failure to make a return compels a taxpayer to make an incriminating disclosure rather than claim the privilege against self-incrimination on his return. In discussing this question, the Court notes that only a "willful" failure to make a return is punishable under § 7203, and that "a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith." *Ante*, at 663 n. 18. Since a good-faith erroneous assertion of the privilege does not expose a taxpayer to criminal liability, I would hold that the threat of prosecution does not compel incriminating disclosures in violation of the Fifth Amendment. The protection accorded a good-faith assertion of the privilege effectively preserves the taxpayer's freedom to choose between making incriminating disclosures and claiming his Fifth Amendment privilege, and I would affirm the judgment of the Court of Appeals for that reason.

Not content to rest its decision on that ground, the Court decides that even if a good-faith erroneous assertion of the privilege could form the basis for criminal

liability, the threat of prosecution does not amount to compulsion. It is constitutionally sufficient, according to the Court, that a *valid* claim of privilege is a defense to a § 7203 prosecution. *Ante,* at 662–665. In so holding, the Court answers a question that by its own admission is not presented by the facts of this case. And, contrary to the implication contained in the Court's opinion, the question is one of first impression in this Court.

Citing *United States* v. *Murdock,* 284 U. S. 141 (1931) (*Murdock I*), the Court observes that a taxpayer who claims the privilege on his return can be convicted of a § 7203 violation without having been given a preliminary ruling on the validity of his claim and a "second chance" to complete his return after his claim is rejected. The Court then leaps to the conclusion that the Fifth Amendment is satisfied as long as a valid claim of privilege is a defense to a § 7203 prosecution.

I accept the proposition that a preliminary ruling is not a prerequisite to a § 7203 prosecution. But cf. *Quinn* v. *United States,* 349 U. S. 155, 165–170 (1955). But it does not follow, and *Murdock I* does not hold, that the absence of a preliminary ruling is of no import in considering whether a defense of good-faith assertion of the privilege is constitutionally required.* It is one thing to deny a good-faith defense to a witness who is given a prompt ruling on the validity of his claim of privilege and an opportunity to reconsider his refusal to testify before subjecting himself to possible punishment for contempt. See, *e. g., Maness* v. *Meyers,* 419 U. S. 449, 460–461 (1975). It would be quite another to deny a good-faith defense to someone like petitioner, who may

*Indeed, as the Court notes, *ante,* at 663 n. 18, the Court held that Murdock was entitled to acquittal if his assertion of the privilege was in good faith. *United States* v. *Murdock,* 290 U. S. 389 (1933) (*Murdock II*).

be denied a ruling on the validity of his claim of privilege until his criminal prosecution, when it is too late to reconsider. If, contrary to the undisputed fact, a taxpayer had no assurance of either a preliminary ruling or a defense of good-faith assertion of the privilege, he could claim the privilege only at the risk that an erroneous assessment of the law of self-incrimination would subject him to criminal liability. In that event, I would consider the taxpayer to have been denied the free choice to claim the privilege, and would view any incriminating disclosures on his tax return as "compelled" within the meaning of the Fifth Amendment. Only because a good-faith erroneous claim of privilege entitles a taxpayer to acquittal under § 7203 can I conclude that petitioner's disclosures are admissible against him.

Syllabus

McKINNEY *v.* ALABAMA

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 74–532. Argued December 15, 1975—Decided March 23, 1976

Pursuant to an Alabama statutory procedure, a prosecuting attorney brought an *in rem* equity action in state court against four magazines named as "respondents," and two other parties, seeking an adjudication of the magazines' obscenity, which resulted in the court's decree that the magazines were "judicially declared to be obscene." Petitioner, a bookstall operator who had not been given notice of or made a party to the equity proceeding, was officially advised of the decree concerning the specific magazines. After officers later bought one of the magazines (New Directions) from petitioner's bookstall, he was charged with violating a criminal statute by selling "mailable matter known . . . to have been judicially found to be obscene." At petitioner's trial, which resulted in his conviction, later upheld on appeal, petitioner was not allowed to have the issue of New Direction's obscenity presented to the jurors, who were instructed that they were not to be concerned with determining obscenity but only with whether or not petitioner had sold material judicially declared to be obscene. *Held:* The Alabama procedures, insofar as they precluded petitioner from litigating the obscenity *vel non* of New Directions as a defense to his criminal prosecution, violated the First and Fourteenth Amendments. *Freedman* v. *Maryland*, 380 U. S. 51; *Heller* v. *New York*, 413 U. S. 483. The constitutional infirmity of those procedures cannot be avoided on the ground urged by the State that the equity action constituted an "adversary judicial proceeding," since the respondents in that action were not in privity with the petitioner and cannot be presumed to have had interests sufficiently identical to petitioner's as adequately to protect his First Amendment rights, which he had a right to assert in his own behalf in a proceeding to which he was a party. Pp. 673–676.

292 Ala. 484, 296 So. 2d 228, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 677. BRENNAN, J., filed a separate opinion, in which MARSHALL, J., joined, and in

all but Part III of which STEWART, J., joined, *post*, p. 678. STEVENS, J., took no part in the consideration or decision of the case.

Robert Eugene Smith argued the cause for petitioner. With him on the brief was *Gilbert H. Deitch*.

Joseph G. L. Marston III, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *William J. Baxley*, Attorney General.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was convicted of selling material which had been judicially declared obscene. At his trial he was not permitted to litigate the obscenity *vel non* of the publication which was the basis of his prosecution, even though he had not been a party to the earlier civil adjudication in which it was held obscene. We granted certiorari, 422 U. S. 1040 (1975), to consider whether this procedure comported with our decisions delineating the safeguards which must attend attempts by the States to prohibit dissemination of expression asserted to be protected by the First and Fourteenth Amendments against such interference. We reverse.

I

Pursuant to the authority conferred upon him by Ala. Code, Tit. 14, c. 64A (Supp. 1973),[1] the District Attorney

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**Barbara Scott* filed a brief for the American Publishers, Inc., et al. as *amici curiae* urging reversal.

[1] Chapter 64A provides in pertinent part:

"§ 374 (5). Equitable action to adjudicate obscenity of mailable matter imported, sold or possessed.—Whenever the solicitor for any judicial circuit or county solicitor has reasonable cause to believe that any person, with knowledge of its contents, is (1) engaged in sending or causing to be sent, bringing or causing to be brought, into this state for sale or commercial distribution, or is (2) in this state,

of the 13th Judicial Circuit of Alabama instituted an action in equity in the Circuit Court of Mobile County seeking an adjudication of the obscenity of certain mailable matter. On February 26, 1970, the Circuit Court entered a decree which announced that the four maga-

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preparing, selling, exhibiting or commercially distributing or giving away, or offering to give away, or has in his possession with intent to sell, or commercially distribute, or to exhibit or give away or offer to give away, any obscene mailable matter, the solicitor for the judicial circuit or county into which such mailable matter is sent or caused to be sent, brought or caused to be brought, or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, may institute an action in equity in the circuit court or any court having equity jurisdiction of the affected county for an adjudication of the obscenity of the mailable matter.

"§ 374 (6). Same; complaint.—The action authorized by section 374 (5) shall be commenced by the filing of a complaint to which shall be attached, as an exhibit, a true copy of the allegedly obscene mailable matter. The complaint shall:

"(a) be directed against the mailable matter by name or description;

"(b) allege its obscene nature;

"(c) designate as respondents and list the names and addresses, as known, of its author, publisher and any other person sending or causing it to be sent, bringing or causing it to be brought into this state for sale or commercial distribution, and of any person in this state preparing, selling, exhibiting or commercially distributing it, or giving it away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away;

"(d) pray for an adjudication that it is obscene;

"(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale or commercial distribution, or in this state preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away; and

"(f) pray for its surrender, seizure and destruction."

zines named in the action were "judicially declared to be obscene." Twelve days later two officers of the State Attorney General's office went to the Paris Bookstall in Birmingham, Ala., a place of business operated by petitioner. They personally delivered to petitioner a letter from the Attorney General informing him of the decree of the Circuit Court of Mobile County and specifying the magazines which had been declared obscene.

On March 31, these officers returned to the Paris Bookstall and there purchased, from petitioner, a copy of the magazine New Directions, which had been specified in the Circuit Court decree and listed in the letter delivered to petitioner. Petitioner was thereafter charged with violating Ala. Code, Tit. 14, § 374 (4) (Supp. 1973),[2] by

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[2] "§ 374 (4). Importation, sale or possession of obscene printed or written matter; penalties.—(1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, or in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

"(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five hundred dollars for each offense, or be both so imprisoned and fined in the discretion of the court."

selling "mailable matter known . . . to have been judicially found to be obscene."

At petitioner's trial for this offense he asserted as a defense his claim that the magazine was not obscene and sought to have this issue submitted to the jury. Petitioner claimed that he could not be found guilty unless the trier of fact in his case made its own determination that the magazine was obscene according to contemporary community standards. The trial court declined to submit this issue to the jury and instructed the jurors that they were not to be concerned with any determination of obscenity, and that they need only decide whether petitioner had sold material judicially declared to be obscene. The jury returned a verdict of guilty.

Petitioner unsuccessfully appealed this judgment to the Alabama Court of Criminal Appeals, whereupon the Alabama Supreme Court granted his petition for certiorari. That court, by a divided vote, also affirmed the judgment of conviction. It ruled that the trial court had properly restricted the issues presented to the jury because the decree of the Mobile County Circuit Court was one *in rem*, conclusively establishing the obscenity of the magazines against all the world. The determination of obscenity in that action was therefore held binding upon petitioner in his subsequent criminal prosecution even though he had not been a party to the earlier equity proceeding. 292 Ala. 484, 296 So. 2d 228 (1974).

II

Petitioner contends that the procedures utilized by the State of Alabama, insofar as they precluded him from litigating the obscenity *vel non* of New Directions as a defense to his criminal prosecution, violated the First and Fourteenth Amendments. We agree. While there can be no doubt under our cases that obscene materials are beyond the protection of the First Amendment, *Roth*

v. *United States*, 354 U. S. 476 (1957); *Miller* v. *California*, 413 U. S. 15 (1973); those decisions have also consistently recognized that the procedures by which a State ascertains whether certain materials are obscene must be ones which ensure "the necessary sensitivity to freedom of expression," *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965); *Heller* v. *New York*, 413 U. S. 483, 489 (1973). The Alabama statutory scheme at issue here, as applied to petitioner, fails to meet this requirement.

It is undisputed that petitioner received no notice of the Mobile Circuit Court equity proceeding, and that he therefore had no opportunity to be heard therein regarding the adjudication of the obscenity *vel non* of New Directions.[3] Yet the State nevertheless seeks to finally bind him, as well as all other potential purveyors of the magazines described in the Mobile proceeding, to the result reached in that proceeding. There is nothing in the opinion of the Supreme Court of Alabama indicating that petitioner had available to him any judicial avenue for initiating a challenge to the Mobile declaration as to the obscenity of New Directions. Decrees resulting from *in rem* proceedings initiated under Chapter 64A of the Alabama Code could in some cases therefore have the same effect as would the *ex parte* determination of a state censorship authority which unilaterally found material offensive and proscribed its distribution. Such a procedure, without any provision for subsequent re-examination of the determination of the censor, would clearly be constitutionally infirm.

[3] Indeed, there is nothing in the record to indicate that he even possessed any copies of that magazine at the time the equity proceeding was commenced. If he did not, it would certainly be quixotic to expect him to anticipate later developing such an interest in the outcome of those proceedings as to prompt him to seek an opportunity to be heard therein.

The State asserts, however, that the Mobile proceeding was an "adversary judicial proceeding" as contemplated by our decisions, *Freedman, supra,* at 58; *Heller, supra,* at 489, and that relevant First Amendment values have thereby been adequately safeguarded. We cannot agree. The Chapter 64A proceeding was indeed "judicial" in the sense that it was presided over by a judge rather than an administrative official. But the State's claim regarding the adversary nature of the *in rem* proceeding is somewhat wide of the mark.

It is not altogether clear from this record precisely what transpired at the hearing in which New Directions was declared obscene. It does appear that there were, in addition to the several magazines named as "respondents" in the proceeding,[4] an individual and a corporate respondent: "Chris Zarocastas, individually and d/b/a Nelson's News Stand; [and] Nelson's News Stand, Inc., a Corporation, d/b/a Nelson's News Stand." The State contends that the existence [5] of these named parties provides sufficient adverseness in the proceedings to permit its use of the adjudication thus obtained to bind nonparties such as petitioner.

Our difficulty with this argument is its assumption that the named parties' interests are sufficiently identical to those of petitioner that they will adequately protect his First Amendment rights. There is no indication that they are in privity with him, as that term is used in determining the binding effects of judgments. See *Litchfield* v. *Goodnow's Adm'r,* 123 U. S. 549, 551 (1887). And we recognized in *Freedman* that individual exhibi-

[4] The publishers of the named magazines were presumably served with notice of the injunctive action in accordance with Ala. Code, Tit. 14, § 374 (7) (Supp. 1973).

[5] The decree recites that "all parties [were] present and represented by counsel," but does not name them, and the record does not otherwise indicate the extent of their participation. App. 100.

tors as well as distributors may be unwilling, for various reasons, to oppose a state claim of obscenity regarding certain material. 380 U. S., at 59. Such parties may, of course, make their own determination whether and how vigorously to assert their own First Amendment rights. The Constitution obviously cannot force anyone to exercise the freedom of expression which it guarantees. Those who are accorded an opportunity to be heard in a judicial proceeding established for determining the extent of their rights are properly bound by its outcome, either because they chose not to contest the State's claim or because they chose to do so and lost.

But it does not follow that a decision reached in such proceedings should conclusively determine the First Amendment rights of others. Nonparties like petitioner may assess quite differently the strength of their constitutional claims and may, of course, have very different views regarding the desirability of disseminating particular materials. We think they must be given the opportunity to make these assessments themselves, as well as the chance to litigate the issues if they so choose.

The State asserts that invalidation of petitioner's conviction will seriously undermine the use of civil proceedings to examine the protected character of specific materials, procedures which according to respondent offer marked advantages for all concerned over dealing with obscenity only in case-by-case criminal prosecutions. Petitioner, however, was convicted and sentenced in a criminal proceeding wherein the issue of obscenity *vel non* was held to be concluded against him by the decree in a civil proceeding to which he was not a party and of which he had no notice. Thus we need not condemn civil proceedings in general, see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 55 (1973), to conclude that this procedure fails to meet the standards required where First Amendment interests are at stake.

Petitioner's conviction must be vacated so that he may be afforded the opportunity to litigate in some forum the issue of the obscenity of New Directions before he may be convicted of selling obscene material.[6] The judgment of the Supreme Court of Alabama is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, concurring.

I concur in the judgment of the Court and I join its opinion on the assumption that the Court is not deciding either of the following propositions:

1. Whether a State may institute in some state court a civil proceeding to adjudicate obscenity and then, merely by notifying publishers and exhibitors of the pendency of such adjudication, thereby bind them everywhere throughout the jurisdiction. I take it, specifically, that the concluding sentence of the fourth-to-last paragraph of the Court's opinion, *ante*, at 676, does not resolve that question. If it does, I refrain from joining that resolution.

2. Whether a system which merely allows one to initiate a challenge to an *ex parte* determination of obscenity is constitutionally proper. I take it that the second paragraph in Part II of the Court's opinion, *ante*, at 674, does not resolve that question. If it does, I refrain from joining it. I had believed, in this connection, that it is

[6] Because we conclude that the obscenity *vel non* of the publication for the sale of which petitioner was convicted has not yet been properly considered by the state courts, we need not pass upon petitioner's claims that the publication was not obscene as a matter of law and that the Alabama statute defining obscenity is impermissibly vague.

settled that the burden of proving that a particular expression is unprotected rests on the censor, *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 560 (1975), and is not to be shifted to the other side by a mere "avenue for initiating a challenge."

I specify these reservations because I feel that each of the stated propositions in the First Amendment area may well be a close and difficult one, that neither has been resolved by this Court, and that, surely, neither needs to be decided in this case.

MR. JUSTICE BRENNAN.

I concur insofar as the judgment of conviction is reversed. I have frequently stated my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73, 113 (1973) (BRENNAN, J., dissenting). Upon that view the Alabama Law on Obscenity, which forbids such dissemination of explicit sexual material to consenting adults, is facially unconstitutional in both its civil and criminal aspects. Therefore, while I agree that petitioner could not constitutionally be convicted and sentenced in a criminal proceeding wherein the issue of obscenity *vel non* was held to be concluded against him by the decree in a civil proceeding to which he was not a party and of which he had no notice, rather than remand for further proceedings not inconsistent with the Court's opinion, I would declare the Alabama law unconstitutional and hold that petitioner cannot be criminally prosecuted for its violation.

However, since presently prevailing constitutional ju-

risprudence accords States a broader power to regulate obscenity than I concede, it is appropriate in that circumstance that I state my concern that the Alabama law contains provisions that violate the First and Fourteenth Amendments because they impermissibly create the risk that citizens will shy away from disseminating or possessing literature and materials that the entire Court would agree are constitutionally protected. See *Jenkins* v. *Georgia*, 418 U. S. 153 (1974).

I

The Alabama Law on Obscenity takes a form that is gaining increasing favor among the States. It permits a test of the issue of obscenity in a civil action prior to any exposure to a criminal penalty. This Court has acknowledged the value of this approach to the solution of the vexing problem of reconciling state efforts to suppress sexually oriented expression with the prohibitions of the First Amendment, as applied to the States through the Fourteenth Amendment. "Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity." *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 442 (1957). "[S]uch a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Paris Adult Theatre I* v. *Slaton*, *supra*, at 55. See generally Lockhart, Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment, 9 Ga. L. Rev. 533, 569–587 (1975).

The Alabama statute, enacted in 1961 and expressly styled the Alabama Law on Obscenity, Ala. Act. No. 856, Ala. Code, Tit. 14, c. 64A (Supp. 1973), recites in § 2 that the Act's purpose is to provide public prosecutors with both a speedy civil remedy for obtaining a judicial determination of the character and contents of publications and an effective power to reach persons responsible for the composition, publication, and distribution of obscene publications within the State. To that end, the statute distinguishes between "mailable" and "nonmailable" matter. This case concerns only the provisions governing "mailable" matter, defined as printed or written material "having second class mailing privileges under the laws of the United States," or which has not been "determined to be nonmailable" under such laws. § 3.[1] A criminal prosecution based upon "mailable" matter may be brought only when such matter has been, to the defendant's knowledge, "judicially found to be obscene" in a prior civil proceeding under the Act. § 4. A prosecuting attorney (solicitor for any judicial circuit or county solicitor) may commence "an action In Equity . . . for an adjudication of the obscenity of the mailable matter" if he has "reasonable cause to believe that any person, with knowledge of its contents," is shipping mailable obscene publications into Alabama or is selling such publications in the State. § 5. The action is "di-

[1] Persons may be criminally prosecuted with respect to "nonmailable" matter without a prior declaration of obscenity in a civil proceeding. § 4. The term "nonmailable" is used in 18 U. S. C. § 1461 to include far more than merely things obscene, and it is still unsettled who is empowered to make findings of nonmailability and under what circumstances, see *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962). Since this case involves only "mailable" matter, however, it is unnecessary to decide here whether the term "nonmailable," despite its uncertain content, may constitutionally be used in any degree to prove obscenity or a defendant's requisite state of mind.

rected against the mailable matter by name or description" and the respondents are the "author, publisher and any other person" responsible for offering the matter "for sale or commercial distribution" in the State or "giving it away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away." § 6. Upon the filing of the complaint and the exhibits, the court "as soon as practicable" must examine the materials and *ex parte* dismiss the complaint "[i]f there is no probable cause to believe that the mailable matter . . . is obscene." § 7. If, however, the court finds probable cause, "it may forthwith issue an order temporarily restraining and prohibiting the sale or distribution of such matter" and issue an order to show cause, "returnable not less than ten days after its service," why the matter shall not be adjudicated obscene. *Ibid.* A full adversary hearing follows, to "be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of press and freedom of speech." § 9.[2] The

[2] Compliance with this provision should limit the duration of any *ex parte* interim restraint granted pursuant to § 7, although in my view explicit time limits would be preferable. For example, the provision for interim restraints in the New York statute approved in *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436 (1957), was in the context of a statute that specified that "[t]he person . . . sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial." *Id.*, at 438 n. 1. And this Court construed 19 U. S. C. § 1305 (a), which prohibits importation of obscene material, as requiring administrative and judicial action within time limits specified by the Court, thus avoiding the constitutional issue that would be presented under the principle applied in such decisions as *Freedman* v. *Maryland*, 380 U. S. 51, 58–59 (1965), and *Blount* v. *Rizzi*, 400 U. S. 410 (1971). *United States* v. *Thirty-seven Photographs*, 402 U. S. 363 (1971).

proceeding is to be conducted under the Rules of Civil Procedure in equity cases.[3] If, after a full hearing, a publication is found obscene, the respondents may be enjoined from further distribution of that publication in Alabama, and respondents residing in Alabama may be required to dispose of such publications in their possession. § 10. An injunction is binding "only upon the Respondents to the action and upon those persons in active concert or participation . . . with such Respondents who receive actual notice . . . ." § 11. Disobedience of an injunction constitutes contempt of court by any respondent or by "any person in active concert or participation by contract or agreement with such respondent, [who receives] actual notice" of the injunction. § 13. If any respondent fails to comply with an order to dispose of the matter, the court may direct the sheriffs in the State to "seize and destroy all such obscene mailable matter." § 10 (c).

The civil provisions are so interwoven with the Act's criminal and other general provisions, § 4, that the constitutional questions raised by them cannot be properly addressed, in my view, without considering the entire Act as it bears upon "mailable" material. This conclusion is underscored by a "cumulative" obscenity law addressed to "hard-core" pornography enacted by Alabama in 1969. Ala. Code, Tit. 14, c. 64C, §§ 374 (16j–16o) (Supp. 1973). Section 374 (16k)(c) of that statute provides that the prohibition against selling, exhibiting, or possessing such materials shall not "be deemed to apply to mailable matter unless such mailable matter is known by such person to have been judicially found to be obscene or to

[3] While the Alabama law provides that the action shall be filed "in equity," § 5, the Alabama Supreme Court on July 3, 1973, adopted Rules of Civil Procedure under which there is now only one form of action known as a "Civil Action." 292 Ala. 484, 487, 296 So. 2d 228, 230 (1974).

represent hard-core pornography under this chapter or under the provisions of any other Alabama statutes."

I shall not discuss all of the provisions that raise questions but only those that appear to me most clearly to be vulnerable to constitutional challenge.

II

Burden of Proof

There can be no question that uncertainty inheres in the definition of obscenity. It is therefore to be expected that those who market written material pertaining to sex should, from fear of criminal prosecution, refrain from handling what may be constitutionally protected literature on that subject. It is this hazard to material protected by the First Amendment which commends Alabama's efforts to minimize that hazard by its regulatory scheme. A civil procedure that complies with the commands of the First Amendment and due process may serve the public interest in controlling obscenity without exposing the marketer to the risks and the stigma of a criminal prosecution, and thus protect, by minimizing the risk of marketer self-censorship, the right to the free publication and dissemination of constitutionally protected literature. But by shifting the determination of obscenity *vel non* to the civil context, the Alabama scheme creates another potential danger that the dissemination of constitutionally protected material will be suppressed.

Although the Act does not specify which party has the burden of proof in the civil proceeding, the Supreme Court of Alabama has held that the burden is on the State to prove the obscenity of the magazines, 292 Ala. 484, 487, 296 So. 2d 228, 231 (1974), and it appears that the State may do so by a mere preponderance of the evidence. Tr. of Oral Arg. 4–5. However, I think that the hazards to First Amendment freedoms inhering in the

regulation of obscenity require that even in such a civil proceeding, the State comply with the more exacting standard of proof beyond a reasonable doubt.

Inherent in all factfinding procedures is the potential for erroneous judgments and, when First Amendment values are implicated, the selection of a standard of proof of necessity implicates the relative *constitutional* acceptability of erroneous judgments. "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value . . . this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of [the existence of the fact] beyond a reasonable doubt." *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958). See, *e. g.*, *In re Winship*, 397 U. S. 358, 369–372 (1970) (Harlan, J., concurring); cf. *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 49–51 (1971) (opinion of BRENNAN, J.). In the civil adjudication of obscenity *vel non*, the bookseller has at stake such an "interest of transcending value"—protection of his right to disseminate and the public's right to receive material protected by the First Amendment. Protection of those rights demands that the factfinder be almost certain—convinced beyond a reasonable doubt—that the materials are not constitutionally immune from suppression. Although *Miller* v. *California*, 413 U. S. 15 (1973), held that the concept of obscenity as defined in that case is not unconstitutionally vague, we have "expressly recognized the complexity of the test of obscenity . . . and the vital necessity in its application of safeguards to prevent denial of 'the protection of freedom of speech and press' " for nonobscene material. *Marcus* v. *Search Warrant*, 367 U. S. 717, 730 (1961). "[T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will

ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963). The uncertainty of that line means that erroneous judgments as to whether material is obscene or not are likely in any event, and are particularly so if the factfinder is only marginally confident that the material falls on the unprotected side of the line. In light of the command of the First Amendment, a standard of proof by a mere preponderance of the evidence poses too substantial a danger that protected material will be erroneously suppressed. Moreover, the potential danger of such erroneous determinations is especially acute in light of the fact that the civil proceeding and the interim restraint pending adjudication on the merits operate as a prior restraint; indeed, the possibility of an erroneous determination is heightened by the fact that the material may never be available to the public and thus need never have truly faced the acid test of acceptance under prevailing community standards.[4] Furthermore, in light of the definition of obscenity—incorporating, as it does under current law, the notion of patent offensiveness to the average member of the community—there is an even greater need for the *judge* operating as sole factfinder to be convinced beyond a reasonable doubt that the material is obscene, for his determination is made without a jury's assessment of community values.

Moreover, the possible erroneous imposition of civil sanctions under the preponderance-of-the-evidence standard simply creates too great a risk of self-censorship by

[4] Indeed, one of the problems with erroneous determinations that prevent marginal material from ever reaching the public is that such material, which is by definition at the fringe of what is currently patently offensive to community standards, will never be able to exert an influence on those inherently evolving standards.

those engaged in dissemination of printed material pertaining to sex. Cf. *Smith* v. *California*, 361 U. S. 147 (1959). Just as the improper allocation of the burden of proof "will create the danger that the legitimate utterance will be penalized" and may thus cause persons to "steer far wider of the unlawful zone," *Speiser* v. *Randall*, *supra*, at 526, the application of a preponderance-of-the-evidence standard rather than proof beyond a reasonable doubt could cause affected persons to be overly careful about the material in which they deal. While the threat of prosecution and punishment in a criminal proceeding may be greater than the threat of economic loss in civil proceedings, the difference is one of degree. Cf. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 277–278 (1964). The inevitable tendency of the preponderance-of-the-evidence standard—by forcing persons dealing in marginal material to make hard judgments as to whether such material is obscene in order to avoid civil sanctions—would be to limit the volume of at least the marginal material a bookseller could permissibly handle, and thus "restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly." *Smith* v. *California*, *supra*, at 154. This "self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Ibid.*

Related to these arguments is another consideration which has particular force in the context where a State purports to make a civil determination of obscenity conclusively binding in a subsequent criminal trial, such as is the case under Alabama's Law on Obscenity. The First Amendment proscribes criminalizing the sale of literature in general. However, criminal statutes prohibiting the sale of obscene literature have been held to be constitutionally permissible. At least two elements

must coalesce to constitute such a crime: (1) some overt act or intent to perform some act beyond mere possession concerning (2) obscene material. Each of these two elements would otherwise have to be proved beyond a reasonable doubt in a criminal proceeding, for it is settled that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U. S., at 364. The requirement that obscenity be proved beyond a reasonable doubt may not be diluted by transporting the determination to a prior civil proceeding, for the essence of the "crime" in reality remains the sale of obscene literature rather than disobedience of a court injunction.

The dangers emanating from the increased likelihood of error resulting from a preponderance-of-the-evidence standard—the likelihood of self-censorship and the erroneous proscription of constitutionally protected material—are no less great in civil than in criminal regulation; if anything, the actual margin of error even under the beyond-a-reasonable-doubt standard may be greater in civil proceedings since judges and juries may be more reluctant to declare material obscene in a criminal proceeding where incarceration will follow as a consequence. Both proceedings thus present the same hazards to First Amendment freedoms, and those hazards may only be reduced to a tolerable level by applying the same rigorous burden of proof.

III

Jury Trial

This Court has held that a jury trial is not a constitutional requirement in a state civil proceeding determining the obscenity *vel non* of written materials. *Alexander* v. *Virginia*, 413 U. S. 836 (1973). However, in light of

the Court's definition of those materials which are beyond the pale of constitutional protection, a jury trial even in civil proceedings serves a salutary function.

> "The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, *i. e.*, that reasonable men may differ whether the material is obscene." *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 448 (1957) (BRENNAN, J., dissenting).

Although the Court has rejected the contention that the Federal Constitution imposes the requirement of such a jury trial on a State conducting a civil proceeding, it is nevertheless clear that a jury is the most appropriate factfinder on the issue of obscenity, assuming the judge, as he must, has initially determined that the material is not protected as a matter of law. See, *e. g.*, *Miller* v. *California*, 413 U. S., at 25–26. Trial by jury is particularly appropriate if the State chooses to enact a statute such as Alabama's which makes the civil determination of obscenity conclusive in a later criminal proceeding involving the parties to the civil action, and States are of course free to adopt such a factfinding procedure as the

fairest and most accurate reflection of community standards.

IV

Effect of the Obscenity Determination in Civil Proceedings on the Criminal Proceeding

Accepting as I must for present purposes the Court's current view of the constitutional permissibility of laws forbidding the dissemination of obscene materials, I do not perceive any constitutional defect in a State's criminalizing the knowing sale of material judicially determined to be obscene, provided, of course, that obscenity was determined beyond a reasonable doubt at a proceeding in which the accused was a party and of which he received adequate notice.[5] However, one problem with such a scheme deserves comment. Under prevailing constitutional doctrine, material cannot be proscribed unless, *inter alia*, " 'the average person, applying *contemporary community standards*' would find that the work, taken as a whole, appeals to the prurient interest . . . [and] describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Miller* v. *California, supra,* at 24 (emphasis supplied). Community standards are inherently in a state of flux, and there is a substantial danger that a civil proceeding declaring given printed matter obscene will forever

[5] I fully agree with the Court that a State may not make any civil proceeding binding in a criminal proceeding involving an individual who was not a party to and who did not receive notice of the civil proceeding. Moreover, a State cannot use the result in a civil proceeding to bind a criminal defendant on any *element of a crime* as a matter of collateral estoppel. However, I do not think the Constitution prohibits a State from making it a crime to disseminate material which was judicially determined to be obscene beyond a reasonable doubt in a prior civil proceeding in which the criminal accused participated. In such a case, the State will still be proving every element of the crime at the criminal trial.

preclude its introduction into the community, even if the community would no longer view it as "patently offensive" or appealing to the "prurient interest." Some of the most celebrated works of our generation would likely have been the pornography of a prior generation. Thus, I would require that, at a minimum, a person charged with dissemination of material knowing it to have been judicially determined to be obscene in a civil proceeding to which he was a party should be permitted to interject into the criminal trial a claim that community standards had evolved from the time of the civil proceeding to the time the acts for which he was charged were committed. If there is some colorable showing of such a change, I believe that the First Amendment and due process would require that the State again demonstrate beyond a reasonable doubt, in the criminal proceeding, that the material was contemporaneously constitutionally "obscene." Cf. *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975).[6]

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[6] Similarly, a State would of course have to prove obscenity beyond a reasonable doubt at the criminal trial if the civil proceeding was brought in a jurisdiction that applied a different "community standard" from the one in which the alleged crime occurred. This Court has held that obscenity must be determined by applying "contemporary community standards" and that a State may adopt a "state" rather than a "national" community standard. *E. g.*, *Hamling* v. *United States*, 418 U. S. 87 (1974); *Jenkins* v. *Georgia*, 418 U. S. 153 (1974). When a State adopts such a "state" or "national" community standard, a civil proceeding brought in one part of the State could constitutionally be employed as a conclusive determination anywhere in the State with respect to an accused who was a party to that proceeding. Since Alabama has adopted such a "state" standard, see, *e. g.*, 292 Ala. 484, 487, 296 So. 2d 228, 230 (1974), its statutory scheme is not constitutionally defective in this regard. However, a State might adopt the standard of a smaller community—for example, a city-wide community; it could not then make it a crime to disseminate material judicially determined to be obscene in a civil proceeding in which the accused par-

V

The Possession Provisions

Another potential effect of civil determinations under the Alabama law will be to deter all the acts proscribed by the statute with respect to the material declared obscene. This is precisely what the statute is meant to do, and generally the Constitution does not assure that acts may be performed with safety in connection with material judicially declared obscene. This is not true, however, with respect to the mere "possession" of obscene material.

The Act has two provisions that affect possession of obscene material. One provision renders possession of "mailable matter known . . . to have been judicially found to be obscene under this chapter" a misdemeanor subject to a possible fine of $500 and up to six months' imprisonment, or both. § 4 (2). This provision is invalid because the First Amendment prohibits States from regulating possession unrelated to distribution or public exhibition. *Stanley* v. *Georgia*, 394 U. S. 557 (1969).

The other provision affecting possession of obscene material, § 15, provides that the possession of "any three of the things enumerated in . . . [§ 4] (except the possession of them for the purpose of return to the person from whom received)" creates a rebuttable presumption that they are intended for dissemination, and the burden of proof that their possession is for the purpose of return is on the possessor. At the least this presumption shifts to defendants the burden of going forward with the evidence on the issue of possession for the purpose of distribution; and if the possessor seeks to explain possession on the ground that he is holding the materials for return, he has the burden of proof on the issue. Mere possession of

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ticipated, unless the civil proceeding also transpired in the same "community" as the criminal proceeding.

obscene material for personal use may not be penalized. The obvious danger in creating a presumption that possession is for the purpose of dissemination is that lawful possession will be penalized or that persons will refrain from lawfully possessing arguably protected material. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958). The Alabama law poses a particular hazard in this regard, because the presumption takes effect once the defendant is shown to have possessed "any three of the things enumerated in" § 4. The "things" enumerated in § 4 are nonmailable obscene matter and mailable matter judicially declared obscene under the Act. Apparently, the presumption would come into play if a person possessed one copy of three different works which fit the statute's description. This would in effect limit persons to the unregulated possession of a maximum of two "things" in their libraries. But even if the presumption were to apply only upon proof of possession of three copies of the same item, it might result in punishment and deterrence of lawful activity, since the right to possess obscene material for personal use is not limited to one or two copies of each item. Juries are not so ingenuous that they will fail to draw reasonable inferences from the possession of multiple copies of obscene works. There is no necessity to add to the weight of such evidence presumptions and shifts in the burden of proof which jeopardize the exercise of free speech.

I concur insofar as the conviction of petitioner is reversed.

MR. JUSTICE MARSHALL joins this opinion.

MR. JUSTICE STEWART joins all but Part III of this opinion.

Syllabus

PAUL, CHIEF OF POLICE, LOUISVILLE, ET AL. *v.* DAVIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 74–891. Argued November 4, 1975—Decided March 23, 1976

A photograph of respondent bearing his name was included in a "flyer" of "active shoplifters," after he had been arrested on a shoplifting charge in Louisville, Ky. After that charge had been dismissed respondent brought this action under 42 U. S. C. § 1983 against petitioner police chiefs, who had distributed the flyer to area merchants, alleging that petitioners' action under color of law deprived him of his constitutional rights. The District Court granted petitioners' motion to dismiss. The Court of Appeals reversed, relying on *Wisconsin* v. *Constantineau,* 400 U. S. 433. *Held:*

1. Petitioners' action in distributing the flyer did not deprive respondent of any "liberty" or "property" rights secured against state deprivation by the Due Process Clause of the Fourteenth Amendment. Pp. 699–710.

(a) The Due Process Clause does not *ex proprio vigore* extend to a person a right to be free of injury wherever the State may be characterized as the tortfeasor. Pp. 699–701.

(b) Reputation alone, apart from some more tangible interests such as employment, does not implicate any "liberty" or "property" interests sufficient to invoke the procedural protection of the Due Process Clause; hence to establish a claim under § 1983 and the Fourteenth Amendment more must be involved than simply defamation by a state official. *Wisconsin* v. *Constantineau, supra,* distinguished. Pp. 701–710.

(c) Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation that has been altered by petitioners' actions, and the interest in reputation alone is thus quite different from the "liberty" or "property" recognized in such decisions as *Bell* v. *Burson,* 402 U. S. 535, and *Morrissey* v. *Brewer,* 408 U. S. 471, where the guarantee of due process required certain procedural safeguards before the State could alter the status of the complainants. Pp. 710–712.

2. Respondent's contention that petitioners' defamatory flyer deprived him of his constitutional right to privacy is without

merit, being based not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private" but on a claim that the State may not publicize a record of an official act like an arrest. Pp. 712–713.

505 F. 2d 1180, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, and in which WHITE, J., joined in part, *post*, p. 714. STEVENS, J., took no part in the consideration or decision of the case.

Carson P. Porter argued the cause for petitioners. With him on the brief was *J. Bruce Miller.*

Daniel T. Taylor III argued the cause for respondent. With him on the brief were *Robert Allen Sedler, William H. Allison, Jr., Melvin L. Wulf, John H. F. Shattuck,* and *Leon Friedman.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari, 421 U. S. 909 (1975), in this case to consider whether respondent's charge that petitioners' defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U. S. C. § 1983 and the Fourteenth Amendment. For the reasons hereinafter stated, we conclude that it does not.

Petitioner Paul is the Chief of Police of the Louisville, Ky., Division of Police, while petitioner McDaniel occupies the same position in the Jefferson County, Ky., Division of Police. In late 1972 they agreed to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating dur-

**Frank G. Carrington, Fred E. Inbau, William K. Lambie,* and *Wayne W. Schmidt* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

ing the Christmas season. In early December petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a "flyer," which began as follows:

> "TO: BUSINESS MEN IN THE METROPOLITAN AREA
>
> "The Chiefs of The Jefferson County and City of Louisville Police Departments, in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged flyer of subjects known to be active in this criminal field.
>
> "This flyer is being distributed to you, the business man, so that you may inform your security personnel to watch for these subjects. These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.
>
> "Only the photograph and name of the subject is shown on this flyer, if additional information is desired, please forward a request in writing . . . ."

The flyer consisted of five pages of "mug shot" photos, arranged alphabetically. Each page was headed:

"NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENTS
ACTIVE SHOPLIFTERS"

In approximately the center of page 2 there appeared photos and the name of the respondent, Edward Charles Davis III.

Respondent appeared on the flyer because on June 14, 1971, he had been arrested in Louisville on a charge of shoplifting. He had been arraigned on this charge in September 1971, and, upon his plea of not guilty, the

charge had been "filed away with leave [to reinstate]," a disposition which left the charge outstanding. Thus, at the time petitioners caused the flyer to be prepared and circulated respondent had been charged with shoplifting but his guilt or innocence of that offense had never been resolved. Shortly after circulation of the flyer the charge against respondent was finally dismissed by a judge of the Louisville Police Court.

At the time the flyer was circulated respondent was employed as a photographer by the Louisville Courier-Journal and Times. The flyer, and respondent's inclusion therein, soon came to the attention of respondent's supervisor, the executive director of photography for the two newspapers. This individual called respondent in to hear his version of the events leading to his appearing in the flyer. Following this discussion, the supervisor informed respondent that although he would not be fired, he "had best not find himself in a similar situation" in the future.

Respondent thereupon brought this § 1983 action in the District Court for the Western District of Kentucky, seeking redress for the alleged violation of rights guaranteed to him by the Constitution of the United States. Claiming jurisdiction under 28 U. S. C. § 1343 (3), respondent sought damages as well as declaratory and injunctive relief. Petitioners moved to dismiss this complaint. The District Court granted this motion, ruling that "[t]he facts alleged in this case do not establish that plaintiff has been deprived of any right secured to him by the Constitution of the United States."

Respondent appealed to the Court of Appeals for the Sixth Circuit which recognized that, under our decisions, for respondent to establish a claim cognizable under § 1983 he had to show that petitioners had deprived

him of a right secured by the Constitution [1] of the United States, and that any such deprivation was achieved under color of law.[2] *Adickes* v. *Kress & Co.*, 398 U. S. 144, 150 (1970). The Court of Appeals concluded that respondent had set forth a § 1983 claim "in that he has alleged facts that constitute a denial of due process of law." 505 F. 2d 1180, 1182 (1974). In its view our decision in *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), mandated reversal of the District Court.

I

Respondent's due process claim is grounded upon his assertion that the flyer, and in particular the phrase "Active Shoplifters" appearing at the head of the page upon which his name and photograph appear, impermissibly deprived him of some "liberty" protected by the Fourteenth Amendment. His complaint asserted that the "active shoplifter" designation would inhibit him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair his future employment opportunities. Accepting that such consequences may flow from the flyer in question, respondent's complaint would appear to state a classical claim for defamation actionable in the courts of virtually every State. Imputing criminal behavior to an individual is generally considered defamatory *per se*, and actionable without proof of special damages.

Respondent brought his action, however, not in the state courts of Kentucky, but in a United States District

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[1] The "and laws" provision of 42 U. S. C. § 1983 is not implicated in this case.

[2] It is not disputed that petitioners' actions were a part of their official conduct and that this element of a § 1983 cause of action is satisfied here.

Court for that State. He asserted not a claim for defamation under the laws of Kentucky, but a claim that he had been deprived of rights secured to him by the Fourteenth Amendment of the United States Constitution. Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are respectively an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment.

In *Greenwood* v. *Peacock*, 384 U. S. 808 (1966), in the course of considering an important and not wholly dissimilar question of the relationship between the National and the State Governments, the Court said that "[i]t is worth contemplating what the result would be if the strained interpretation of § 1443 (1) urged by the individual petitioners were to prevail." *Id.*, at 832. We, too, pause to consider the result should respondent's interpretation of § 1983 and of the Fourteenth Amendment be accepted.

If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under § 1983. And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983.

It is hard to perceive any logical stopping place to such

a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

II

The result reached by the Court of Appeals, which respondent seeks to sustain here, must be bottomed on one of two premises. The first is that the Due Process Clause of the Fourteenth Amendment and § 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims. The second premise is that the infliction by state officials of a "stigma" to one's reputation is somehow different in kind from the infliction by the same official of harm or injury to other interests protected by state law, so that an injury to reputation is actionable under § 1983 and the Fourteenth Amendment even if other such harms are not. We examine each of these premises in turn.

A

The first premise would be contrary to pronouncements in our cases on more than one occasion with respect to the scope of § 1983 and of the Fourteenth Amendment. In the leading case of *Screws* v. *United States*, 325 U. S. 91 (1945), the Court considered the proper application of the criminal counterpart of § 1983, likewise intended by Congress to enforce the guarantees of the Fourteenth

Amendment. In his opinion for the Court plurality in that case, Mr. Justice Douglas observed:

> "Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States." 325 U. S., at 108–109.

After recognizing that Congress' power to make criminal the conduct of state officials under the aegis of the Fourteenth Amendment was not unlimited because that Amendment "did not alter the basic relations between the States and the national government," the plurality opinion observed that Congress should not be understood to have attempted

> "to make all torts of state officials federal crimes. It brought within [the criminal provision] only specified acts done 'under color' of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States." *Id.*, at 109.

This understanding of the limited effect of the Fourteenth Amendment was not lost in the Court's decision in *Monroe* v. *Pape*, 365 U. S. 167 (1961). There the Court was careful to point out that the complaint stated a cause of action under the Fourteenth Amendment because it alleged an unreasonable search and seizure violative of the guarantee "contained in the Fourth Amendment [and] made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." *Id.*, at 171. Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded.

Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, *Griffin* v. *Breckenridge*, 403 U. S. 88, 101–102 (1971); *a fortiori*, the procedural guarantees of the Due Process Clause cannot be the source for such law.

B

The second premise upon which the result reached by the Court of Appeals could be rested—that the infliction by state officials of a "stigma" to one's reputation is somehow different in kind from infliction by a state official of harm to other interests protected by state law—is equally untenable. The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause. As we have said, the Court of Appeals, in reaching a contrary conclusion, relied primarily upon *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971). We think the correct import of that

decision, however, must be derived from an examination of the precedents upon which it relied, as well as consideration of the other decisions by this Court, before and after *Constantineau*, which bear upon the relationship between governmental defamation and the guarantees of the Constitution. While not uniform in their treatment of the subject, we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth [3] or Fourteenth Amendment.

In *United States* v. *Lovett*, 328 U. S. 303 (1946), the Court held that an Act of Congress which specifically forbade payment of any salary or compensation to three named Government agency employees was an unconstitutional bill of attainder. The three employees had been proscribed because a House of Representatives subcommittee found them guilty of "subversive activity," and therefore unfit for Government service. The Court, while recognizing that the underlying charges upon which Congress' action was premised "stigmatized [the employees'] reputation and seriously impaired their chance to earn a living," *id.*, at 314, also made it clear that "[w]hat is involved here is a congressional proscription of [these employees], prohibiting their ever holding a government job." *Ibid.*

Subsequently, in *Joint Anti-Fascist Refugee Comm.*

[3] If respondent is correct in his contention that defamation by a state official is actionable under the Fourteenth Amendment, it would of course follow that defamation by a federal official should likewise be actionable under the cognate Due Process Clause of the Fifth Amendment. Surely the Fourteenth Amendment imposes no more stringent requirements upon state officials than does the Fifth upon their federal counterparts. We thus consider this Court's decisions interpreting either Clause as relevant to our examination of respondent's claim.

v. *McGrath*, 341 U. S. 123 (1951), the Court examined the validity of the Attorney General's designation of certain organizations as "Communist" on a list which he furnished to the Civil Service Commission. There was no majority opinion in the case; Mr. Justice Burton, who announced the judgment of the Court, wrote an opinion which did not reach the petitioners' constitutional claim. Mr. Justice Frankfurter, who agreed with Mr. Justice Burton that the petitioners had stated a claim upon which relief could be granted, noted that "publicly designating an organization as within the proscribed categories of the Loyalty Order does not directly deprive anyone of liberty or property." *Id.*, at 164. Mr. Justice Douglas, who likewise concluded that petitioners had stated a claim, observed in his separate opinion:

> "This is not an instance of name calling by public officials. This is a determination of status—a proceeding to ascertain whether the organization is or is not 'subversive.' This determination has consequences that are serious to the condemned organizations. Those consequences flow in part, of course, from public opinion. But they also flow from actions of regulatory agencies that are moving in the wake of the Attorney General's determination to penalize or police these organizations." *Id.*, at 175.

Mr. Justice Jackson, who likewise agreed that petitioners had stated a claim, commented:

> "I agree that mere designation as subversive deprives the organizations themselves of no legal right or immunity. By it they are not dissolved, subjected to any legal prosecution, punished, penalized, or prohibited from carrying on any of their activities. Their claim of injury is that they cannot attract audiences, enlist members, or obtain contributions

as readily as before. These, however, are sanctions applied by public disapproval, not by law." *Id.*, at 183–184.

He went on to say:

"[T]he real target of all this procedure is the government employee who is a member of, or sympathetic to, one or more accused organizations. He not only may be discharged, but disqualified from employment, upon no other ground than such membership or sympathetic affiliation. . . . To be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity." *Id.*, at 184–185.

Mr. Justice Reed, writing for himself, The Chief Justice, and Mr. Justice Minton, would have held that petitioners failed to state a claim for relief. In his dissenting opinion, after having stated petitioners' claim that their listing resulted in a deprivation of liberty or property contrary to the procedure required by the Fifth Amendment, he said:

"The contention can be answered summarily by saying that there is no deprivation of any property or liberty of any listed organization by the Attorney General's designation. It may be assumed that the listing is hurtful to their prestige, reputation and earning power. It may be such an injury as would entitle organizations to damages in a tort action against persons not protected by privilege. . . . This designation, however, does not prohibit any business of the organizations, subject them to any punishment or deprive them of liberty of speech or other freedom." *Id.*, at 202.

Thus at least six of the eight Justices who participated

in that case viewed any "stigma" imposed by official action of the Attorney General of the United States, divorced from its effect on the legal status of an organization or a person, such as loss of tax exemption or loss of government employment, as an insufficient basis for invoking the Due Process Clause of the Fifth Amendment.

In *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), the Court again recognized the potential "badge of infamy" which might arise from being branded disloyal by the government. *Id.*, at 191. But it did not hold this sufficient by itself to invoke the procedural due process guarantees of the Fourteenth Amendment; indeed, the Court expressly refused to pass upon the procedural due process claims of petitioners in that case. *Id.*, at 192. The Court noted that petitioners would, as a result of their failure to execute the state loyalty oath, lose their teaching positions at a state university. It held such state action to be arbitrary because of its failure to distinguish between innocent and knowing membership in the associations named in the list prepared by the Attorney General of the United States. *Id.*, at 191. See also *Peters* v. *Hobby*, 349 U. S. 331, 347 (1955).

A decade after *Joint Anti-Fascist Refugee Comm.* v. *McGrath, supra*, the Court returned to consider further the requirements of procedural due process in this area in the case of *Cafeteria Workers* v. *McElroy*, 367 U. S. 886 (1961). Holding that the discharge of an employee of a Government contractor in the circumstances there presented comported with the due process required by the Fifth Amendment, the Court observed:

> "Finally, it is to be noted that this is not a case where government action has operated to bestow a badge of disloyalty or infamy, *with an attendant foreclosure from other employment opportunity.* See

Wieman v. *Updegraff*, 344 U. S. 183, 190–191; *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123, 140–141 . . . ." *Id.*, at 898. (Emphasis supplied.)

Two things appear from the line of cases beginning with *Lovett*. The Court has recognized the serious damage that could be inflicted by branding a government employee as "disloyal," and thereby stigmatizing his good name. But the Court has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment.[4]

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[4] We cannot agree with the suggestion of our Brother BRENNAN, dissenting, *post*, at 727, that the actions of these two petitioner law enforcement officers come within the language used by Mr. Justice Harlan in his dissenting opinion in *Jenkins* v. *McKeithen*, 395 U. S. 411, 433 (1969). They are not by any conceivable stretch of the imagination, either separately or together, "an agency whose sole or predominant function, without serving any other public interest, is to expose and publicize the names of persons it finds guilty of wrongdoing." *Id.*, at 438. Indeed, the actions taken by these petitioners in this case fall far short of the more formalized proceedings of the Commission on Civil Rights established by Congress in 1957, the procedures of which were upheld against constitutional challenge by this Court in *Hannah* v. *Larche*, 363 U. S. 420 (1960). There the Court described the functions of the Commission in this language:

"It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any *legal sanctions*. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's *legal rights*. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action." *Id.*, at 441 (emphasis supplied).

Addressing itself to the question of whether the Commission's

It is noteworthy that in *Barr* v. *Matteo*, 360 U. S. 564 (1959), and *Howard* v. *Lyons*, 360 U. S. 593 (1959), this Court had before it two actions for defamation brought against federal officers. But in neither opinion is there any intimation that any of the parties to those cases, or any of the Members of this Court, had the remotest idea that the Due Process Clause of the Fifth Amendment might itself form the basis for a claim for defamation against federal officials.

It was against this backdrop that the Court in 1971 decided *Constantineau*. There the Court held that a Wisconsin statute authorizing the practice of "posting" was unconstitutional because it failed to provide procedural safeguards of notice and an opportunity to be heard, prior to an individual's being "posted." Under the statute "posting" consisted of forbidding in writing the sale or delivery of alcoholic beverages to certain persons who were determined to have become hazards to themselves, to their family, or to the community by reason of their "excessive drinking." The statute also made it a misdemeanor to sell or give liquor to any person so posted. See 400 U. S., at 434 n. 2.

There is undoubtedly language in *Constantineau*, which is sufficiently ambiguous to justify the reliance upon it by the Court of Appeals:

> "Yet certainly where the state attaches 'a badge of infamy' to the citizen, due process comes into play.

"proceedings might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecuitons," the Court said that "even if such collateral consequences were to flow from the Commission's investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function." *Id.*, at 443.

> *Wieman* v. *Updegraff*, 344 U. S. 183, 191. '[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 168 (Frankfurter, J., concurring).
>
> "Where a person's good name, reputation, honor, or integrity is at stake *because of what the government is doing to him*, notice and an opportunity to be heard are essential." *Id.*, at 437 (emphasis supplied).

The last paragraph of the quotation could be taken to mean that if a government official defames a person, without more, the procedural requirements of the Due Process Clause of the Fourteenth Amendment are brought into play. If read that way, it would represent a significant broadening of the holdings of *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), and *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (1951), relied upon by the *Constantineau* Court in its analysis in the immediately preceding paragraph. We should not read this language as significantly broadening those holdings without in any way adverting to the fact if there is any other possible interpretation of *Constantineau*'s language. We believe there is.

We think that the italicized language in the last sentence quoted, "because of what the government is doing to him," referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry. "Posting," therefore, significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting

from the defamation, justified the invocation of procedural safeguards. The "stigma" resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any "liberty" protected by the procedural guarantees of the Fourteenth Amendment.

This conclusion is reinforced by our discussion of the subject a little over a year later in *Board of Regents* v. *Roth,* 408 U. S. 564 (1972). There we noted that "the range of interests protected by procedural due process is not infinite," *id.,* at 570, and that with respect to property interests they are

> "of course, . . . not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.,* at 577.

While *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment:

> "The state, *in declining to rehire the respondent,* did not make any charge against him that might seriously damage his standing and associations in his community. . . .
>
> "Similarly, there is no suggestion that the State, *in declining to re-employ the respondent,* imposed on

> him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.*, at 573 (emphasis supplied).

Thus it was not thought sufficient to establish a claim under § 1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment. Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee.

This conclusion is quite consistent with our most recent holding in this area, *Goss* v. *Lopez*, 419 U. S. 565 (1975), that suspension from school based upon charges of misconduct could trigger the procedural guarantees of the Fourteenth Amendment. While the Court noted that charges of misconduct could seriously damage the student's reputation, *id.*, at 574–575, it also took care to point out that Ohio law conferred a right upon all children to attend school, and that the act of the school officials suspending the student there involved resulted in a denial or deprivation of that right.

III

It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law,[5] and we

[5] There are other interests, of course, protected not by virtue of their recognition by the law of a particular State but because they are guaranteed in one of the provisions of the Bill of Rights which

have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. In *Bell* v. *Burson*, 402 U. S. 535 (1971), for example, the State by issuing drivers' licenses recognized in its citizens a right to operate a vehicle on the highways of the State. The Court held that the State could not withdraw this right without giving petitioner due process. In *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), the State afforded parolees the right to remain at liberty as long as the conditions of their parole were not violated. Before the State could alter the status of a parolee because of alleged violations of these conditions, we held that the Fourteenth Amendment's guarantee of due process of law required certain procedural safeguards.

In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a

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has been "incorporated" into the Fourteenth Amendment. Section 1983 makes a deprivation of such rights actionable independently of state law. See *Monroe* v. *Pape*, 365 U. S. 167 (1961).

Our discussion in Part III is limited to consideration of the procedural guarantees of the Due Process Clause and is not intended to describe those substantive limitations upon state action which may be encompassed within the concept of "liberty" expressed in the Fourteenth Amendment. Cf. Part IV, *infra*.

result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest in reputation asserted in this case is neither "liberty" nor "property" guaranteed against state deprivation without due process of law.

Respondent in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. That being the case, petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any "liberty" or "property" interests protected by the Due Process Clause.

IV

Respondent's complaint also alleged a violation of a "right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments." The Court of Appeals did not pass upon this claim since it found the allegations of a due process violation sufficient to require reversal of the District Court's order. As we have agreed with the District Court on the due process issue, we find it necessary to pass upon respondent's other theory in order to determine whether there is any support for the litigation he seeks to pursue.

While there is no "right of privacy" found in any specific guarantee of the Constitution, the Court has recognized that "zones of privacy" may be created by

more specific constitutional guarantees and thereby impose limits upon government power. See *Roe* v. *Wade*, 410 U. S. 113, 152–153 (1973). Respondent's case, however, comes within none of these areas. He does not seek to suppress evidence seized in the course of an unreasonable search. See *Katz* v. *United States*, 389 U. S. 347, 351 (1967); *Terry* v. *Ohio*, 392 U. S. 1, 8–9 (1968). And our other "right of privacy" cases, while defying categorical description, deal generally with substantive aspects of the Fourteenth Amendment. In *Roe* the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are "fundamental" or "implicit in the concept of ordered liberty" as described in *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937). The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protection—matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct.

Respondent's claim is far afield from this line of decisions. He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

None of respondent's theories of recovery were based upon rights secured to him by the Fourteenth Amend-

ment. Petitioners therefore were not liable to him under § 1983. The judgment of the Court of Appeals holding otherwise is

Reversed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs and MR. JUSTICE WHITE concurs in part, dissenting.

I dissent. The Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society. If there are no constitutional restraints on such oppressive behavior, the safeguards constitutionally accorded an accused in a criminal trial are rendered a sham, and no individual can feel secure that he will not be arbitrarily singled out for similar *ex parte* punishment by those primarily charged with fair enforcement of the law. The Court accomplishes this result by excluding a person's interest in his good name and reputation from all constitutional protection, regardless of the character of or necessity for the government's actions. The result, which is demonstrably inconsistent with our prior case law and unduly restrictive in its construction of our precious Bill of Rights, is one in which I cannot concur.

To clarify what is at issue in this case, it is first necessary to dispel some misconceptions apparent in the Court's opinion. Title 42 U. S. C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within

> the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Thus, as the Court indicates, *ante,* at 696–697, respondent's complaint, to be cognizable under § 1983, must allege both a deprivation of a constitutional right [1] and the effectuation of that deprivation under color of law. See, *e. g., Adickes* v. *Kress & Co.,* 398 U. S. 144, 150 (1970). But the implication, see *ante,* at 697–699, that the existence *vel non* of a state remedy—for example, a cause of action for defamation—is relevant to the determination whether there is a cause of action under § 1983, is wholly unfounded. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe* v. *Pape,* 365 U. S. 167, 183 (1961). See also, *e. g., McNeese* v. *Board of Education,* 373 U. S. 668, 671–672 (1963). Indeed, even if the Court were creating a novel doctrine that state law is in any way relevant, it would be incumbent upon the Court to inquire whether respondent has an adequate remedy under Kentucky law or whether petitioners would be immunized by state doctrines of official or sovereign immunity. The Court, however, undertakes no such inquiry.

Equally irrelevant is the Court's statement that "[c]oncededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law." *Ante,* at 698. The action complained of here is "state

[1] Deprivations of rights secured by "laws" as well as by the Constitution are actionable under § 1983. Only an alleged constitutional violation is involved in this case. *Ante,* at 697 n. 1.

action" allegedly in violation of the Fourteenth Amendment, and that Amendment, which is *only* designed to prohibit "state" action, clearly renders unconstitutional actions taken by state officials that would merely be criminal or tortious if engaged in by those acting in their private capacities. Of course, if a private citizen enters the home of another, manacles and threatens the owner, and searches the house in the course of a robbery, he would be criminally and civilly liable under state law, but no constitutional rights of the owner would be implicated. However, if state police officials engage in the same acts in the course of a narcotics investigation, the owner may maintain a damages action against the police under § 1983 for deprivation of constitutional rights "under color of" state law. Cf. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 390–392 (1971). See also, *e. g.*, *Monroe* v. *Pape*, *supra*. In short, it is difficult to believe that the Court seriously suggests, see *ante*, at 697–698, that there is some anomaly in the distinction, for constitutional purposes, between tortious conduct committed by a private citizen and the same conduct committed by state officials under color of state law.

It may be that I misunderstand the thrust of Part I of the Court's opinion. Perhaps the Court is not questioning the involvement of a constitutional "liberty" or "property" interest in this case, but rather whether the deprivation of those interests was accomplished "under color of" state law. The Court's expressed concern that but for today's decision, negligent tortious behavior by state officials might constitute a § 1983 violation, see *ante*, at 698, suggests this reading.[2] But that concern is

[2] Indeed, it would be difficult to interpret that discussion as anything but a discussion of the "under color of" law requirement of § 1983, which is not involved in this case and which has no relationship to the question whether a "liberty" or "property" interest is

groundless. An official's actions are not "under color of" law merely because he is an official; an off-duty policeman's discipline of his own children, for example, would not constitute conduct "under color of" law. The essential element of this type of § 1983 action [3] is *abuse* of his *official position.* "Congress, in enacting [§ 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's *abuse of his position.*" *Monroe* v. *Pape, supra,* at 172 (emphasis supplied). Section 1983 focuses on "[m]isuse of power, possessed by virtue of state law and *made possible only because the wrongdoer is clothed with the authority of state law.*" *United States* v. *Classic,* 313 U. S. 299, 326 (1941) (emphasis supplied). Moreover, whether or not mere negligent official conduct in the course of duty can ever constitute such abuse of power, the police officials here concede that their conduct was intentional and was undertaken in their official capacities. Therefore, beyond peradventure, it is action taken under color of law, see *ante,* at 697, and n. 2, and it is disingenuous for the Court to argue, see *ante,* at 700–701, that respondent is seeking to convert § 1983 into a generalized font of tort law. The only issue properly presented by this case is whether petitioners' intentional conduct infringed any of respondent's "liberty" or "property" interests without due process of law, and that is the question to be addressed. I am

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involved here. There is simply no way in which the Court, despite today's treatment of the terms "liberty" and "property," could declare that the loss of a person's life is not an interest cognizable within the "life" portion of the Due Process Clause. See *ante,* at 698–699.

[3] Of course, in addition to providing a remedy when an official abuses his position, § 1983 is designed to provide a remedy when a state statute itself abridges constitutional rights, when a remedy under state law is inadequate to protect constitutional rights, and when a state remedy, though adequate in theory, is unavailable in practice. See, *e. g., Monroe* v. *Pape,* 365 U. S. 167, 173–174 (1961).

persuaded that respondent has alleged a case of such infringement, and therefore of a violation of § 1983.

The stark fact is that the police here have officially imposed on respondent the stigmatizing label "criminal" without the salutary and constitutionally mandated safeguards of a criminal trial. The Court concedes that this action will have deleterious consequences for respondent. For 15 years, the police had prepared and circulated similar lists, not with respect to shoplifting alone, but also for other offenses. App. 19, 27–28. Included in the five-page list in which respondent's name and "mug shot" appeared were numerous individuals who, like respondent, were never convicted of any criminal activity and whose only "offense" was having once been arrested.[4]

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[4] Petitioners testified:

"Q. And you didn't limit this to persons who had been convicted of the offense of shoplifting, is that correct?

"A. That's correct.

. . . . . .

"Q. Now, my question is what is the basis for your conclusion that a person—a person who has been arrested for the offense of shoplifting is an active shoplifter?

"A. The very fact that he's been arrested for the charge of shoplifting and evidence presented to that effect.

. . . . . .

"Q. And this is not based on any finding of the court?

"A. No, sir." App. 26.

"Q. All right. So that if my understanding is correct, this included all persons who were arrested in '71 and '72?

"A. That's true.

"Q. And selected persons from—who were arrested in previous years?

"A. . . . I assume from the number of persons here that many of these have been arrested many years back down the line consecutively . . . .

"Q. So there's no distinction made between persons whose arrest terminated in convictions and persons whose arrest did not terminate in convictions?

"A. No, sir." *Id.*, at 29.

Indeed, respondent was arrested over 17 months before the flyer was distributed,[5] not by state law enforcement authorities, but by a store's private security police, and nothing in the record appears to suggest the existence at that time of even constitutionally sufficient probable cause for that single arrest on a shoplifting charge.[6] Nevertheless, petitioners had 1,000 flyers printed (800 were distributed widely throughout the Louisville business community) proclaiming that the individuals identi-

[5] Respondent was arrested on June 14, 1971. He pleaded not guilty and the charge was "filed away with leave [to reinstate]" on September 22, 1971. The distribution of the flyer was on December 5, 1972. The shoplifting charge was dismissed on December 11, 1972, and respondent filed his complaint the following day. He sought compensatory and punitive damages, and an injunction prohibiting similar dissemination of such flyers in the future and ordering petitioners to obtain the return of the flyers and to instruct those who received them that respondent and the others pictured in the flyers were not "active shoplifters," and had not been convicted of shoplifting or any similar offense. Respondent's only other arrest took place five years previously for a speeding offense.

[6] The Court, by totally excluding a person's interest in his reputation from any cognizance under the Due Process Clause, would be forced to reach the same conclusion that there is no cause of action under § 1983—even to obtain injunctive relief—if petitioners had randomly selected names from the Louisville telephone directory for inclusion in the "active shoplifters" flyer. Of course, even if a person has been arrested on a constitutionally sufficient basis, that does not justify the State's treating him as a criminal.

"The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated." *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 241 (1957). The constitutional presumption of innocence, the requirement that conviction for a crime must be based on proof beyond a reasonable doubt, and the other safeguards of a criminal trial are obviously designed at least in part to give concrete meaning to this fact.

fied by name and picture were "subjects *known* to be *active* in this criminal field [shoplifting]," and trumpeting the "fact" that each page depicted *"Active Shoplifters"* (emphasis supplied).[7]

Although accepting the truth of the allegation, as we must on the motion to dismiss, see, *e. g., Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 174–175 (1965); cf. *Conley* v. *Gibson*, 355 U. S. 41 (1957), that dissemination of this flyer would "seriously impair [respondent's] future employment opportunities" and "inhibit him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended," *ante*, at 697, the Court characterizes the allegation as "mere defamation" involving no infringement of constitutionally protected interests. *E. g., ante*, at 706. This is because, the Court holds, neither a "liberty" nor a "property" interest was invaded by the injury done respondent's reputation and therefore no violation of § 1983 or the Fourteenth Amendment was alleged. I wholly disagree.

It is important, to paraphrase the Court, that "[w]e, too, [should] pause to consider the result should [the Court's] interpretation of § 1983 and of the Fourteenth Amendment be accepted." *Ante*, at 698. There is no attempt by the Court to analyze the question as one of reconciliation of constitutionally protected personal rights and the exigencies of law enforcement. No effort is made to distinguish the "defamation" that occurs when a grand jury indicts an accused from the "defamation" that occurs when executive officials arbitrarily and with-

[7] At one point in the flyer, there was also an indication that "[t]hese persons have been arrested during 1971 and 1972 *or* have been active in various criminal fields in high density shopping areas." The stated purpose of the flyer was "so that you, the businessman . . . may inform your security personnel to *watch for* these subjects." *Ante*, at 695 (emphasis supplied).

out trial declare a person an "active criminal." [8] Rather, the Court by mere fiat and with no analysis wholly excludes personal interest in reputation from the ambit of "life, liberty, or property" under the Fifth and Fourteenth Amendments, thus rendering due process concerns *never* applicable to the official stigmatization, however arbitrary, of an individual. The logical and disturbing corollary of this holding is that no due process infirmities would inhere in a statute constituting a commission to conduct *ex parte* trials of individuals, so long as the only official judgment pronounced was limited to the public condemnation and branding of a person as a Communist, a traitor, an "active murderer," a homosexual, or any other mark that "merely" carries social opprobrium. The potential of today's decision is frightening for a free people.[9] That decision surely finds no support in our relevant constitutional jurisprudence.

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[8] Indeed, the Court's opinion confuses the two separate questions of whether reputation is a "liberty" or "property" interest and whether, in a particular context, state action with respect to that interest is a violation of due process. *E. g.*, *ante*, at 698–699, 701–702, and n. 3 (assuming that if reputation is a cognizable liberty or property interest, every defamation by a public official would be an offense against the Due Process Clause of the Fifth or Fourteenth Amendment).

[9] Today's holding places a vast and arbitrary power in the hands of federal and state officials. It is not difficult to conceive of a police department, dissatisfied with what it perceives to be the dilatory nature or lack of efficacy of the judicial system in dealing with criminal defendants, publishing periodic lists of "active rapists," "active larcenists," or other "known criminals." The hardships resulting from this official stigmatization—loss of employment and educational opportunities, creation of impediments to professional licensing, and the imposition of general obstacles to the right of all free men to the pursuit of happiness—will often be as severe as actual incarceration, and the Court today invites and condones such lawless action by those who wish to inflict punishment without compliance with the procedural safeguards constitutionally required of the criminal justice system.

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. See, *e. g., Bolling* v. *Sharpe,* 347 U. S. 497, 499–500; *Stanley* v. *Illinois,* 405 U. S. 645." *Board of Regents* v. *Roth,* 408 U. S. 564, 572 (1972). "Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923).[10] Certainly the enjoyment of

[10] One of the more questionable assertions made by the Court suggests that "liberty" or "property" interests are protected only if they are recognized under state law or protected by one of the specific guarantees of the Bill of Rights. *Ante,* at 710, and n. 5. To be sure, the Court has held that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as* state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents* v. *Roth,* 408 U. S. 564, 577 (1972) (emphasis supplied). See also, *e. g., Goss* v. *Lopez,* 419 U. S. 565, 572–573 (1975). However, it should also be clear that if the Federal Government, for example, creates an entitlement to some benefit, the States cannot infringe a person's enjoyment of that "property" interest without compliance with the dictates of due process. Moreover, we have never restricted "liberty" interests in the manner the Court today attempts to do. The Due Process Clause of the Fifth Amendment, like the Due Process Clause of the Fourteenth Amendment, protects "liberty" interests. But the content of "liberty" in those Clauses has never been thought to depend on recognition of an interest by the State or Federal Government, and has never been restricted to interests explicitly recognized by other provisions of the Bill of Rights:

" 'While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to

one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal "liberty."

> "[A]s MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name
>
> " 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341 (1974).[11]

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acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' *Meyer* v. *Nebraska*, 262 U. S. 390, 399." *Board of Regents* v. *Roth*, *supra*, at 572.

See also, *e. g.*, *Arnett* v. *Kennedy*, 416 U. S. 134, 157 (1974) (opinion of REHNQUIST, J.). It should thus be clear that much of the content of "liberty" has no tie whatsoever to particular provisions of the Bill of Rights, and the Court today gives no explanation for its narrowing of that content.

[11] It is strange that the Court should hold that the interest in one's good name and reputation is not embraced within the concept of "liberty" or "property" under the Fourteenth Amendment, and yet hold that that same interest, when recognized under state law, is sufficient to overcome the specific protections of the First Amendment. See, *e. g.*, *Gertz* v. *Robert Welch, Inc.*; *Time, Inc.* v. *Firestone*, *ante*, p. 448.

We have consistently held that

> "'[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' *Wisconsin* v. *Constantineau*, 400 U. S. 433, 437. *Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *United States* v. *Lovett*, 328 U. S. 303, 316–317; *Peters* v. *Hobby*, 349 U. S. 331, 352 (DOUGLAS, J., concurring). See *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 898." *Board of Regents* v. *Roth*, *supra*, at 573.

See also, *e. g.*, *Greene* v. *McElroy*, 360 U. S. 474, 496 (1959); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 899–902 (1961) (BRENNAN, J., dissenting); *Goss* v. *Lopez*, 419 U. S. 565, 574–575 (1975). In the criminal justice system, this interest is given concrete protection through the presumption of innocence and the prohibition of state-imposed punishment unless the State can demonstrate beyond a reasonable doubt, at a public trial with the attendant constitutional safeguards, that a particular individual has engaged in proscribed criminal conduct. "[B]ecause of the certainty that [one found guilty of criminal behavior] would be stigmatized by the conviction . . . a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *In re Winship*, 397 U. S. 358, 363–364 (1970). "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing

a proper factfinder of his guilt with utmost certainty." *Id.*, at 364.[12]

Today's decision marks a clear retreat from *Jenkins* v. *McKeithen*, 395 U. S. 411 (1969), a case closely akin to the factual pattern of the instant case, and yet essentially ignored by the Court. *Jenkins*, which was also an action brought under § 1983, both recognized that the public branding of an individual implicates interests cognizable as either "liberty" or "property," and held that such public condemnation cannot be accomplished without procedural safeguards designed to eliminate arbitrary or capricious executive action. *Jenkins* involved the constitutionality of the Louisiana Labor-Management Commission of Inquiry, an executive agency whose "very purpose . . . is to find persons guilty of violating criminal laws without trial or procedural safeguards, and to publicize those findings." 395 U. S., at 424.

> "[T]he personal and economic consequences alleged to flow from such actions are sufficient to meet the requirement that appellant prove a legally redressable injury. Those consequences would certainly be actionable if caused by a private party and thus should be sufficient to accord appellant standing. See *Greene* v. *McElroy*, 360 U. S. 474, 493, n. 22

[12] The Court's insensitivity to these constitutional dictates is particularly evident when it declares that because respondent had never been brought to trial, "his guilt or innocence of that offense [shoplifting] had never been resolved." *Ante*, at 696. It is hard to conceive of a more devastating flouting of the presumption of innocence, "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship*, 397 U. S., at 363, quoting *Coffin* v. *United States*, 156 U. S. 432, 453 (1895). Moreover, even if a person was once convicted of a crime, that does not mean that he is "actively engaged" in that activity now.

(1959); *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 140–141 (opinion of Burton, J.); *id.,* at 151–160 (Frankfurter, J., concurring). It is no answer that the Commission has not itself tried to impose any direct sanctions on appellant; it is enough that the Commission's alleged actions will have a substantial impact on him. . . . Appellant's allegations go beyond the normal publicity attending criminal prosecution; he alleges a concerted attempt publicly to brand him a criminal without a trial." *Id.,* at 424–425.

Significantly, we noted that one defect in the Commission was that it "exercises a function very much akin to making an official adjudication of criminal culpability," and that it was "concerned only with exposing violations of criminal laws by specific individuals." *Id.,* at 427. "[I]t is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws of Louisiana and the United States and to brand them as criminals in public." *Id.,* at 428. See also *ibid.,* quoting *Hannah* v. *Larche,* 363 U. S. 420, 488 (1960) (Frankfurter, J., concurring in result). Although three Justices in dissent would have dismissed the complaint for lack of standing, since there were no allegations that the appellant would be investigated, called as a witness, or named in the Commission's findings, 395 U. S., at 436 (Harlan, J., dissenting), they nevertheless observed, *id.,* at 438:

"[There is] a constitutionally significant distinction between two kinds of governmental bodies. The first is an agency whose sole or predominant function, without serving any other public interest, is to expose and publicize the names of persons it finds guilty of wrongdoing. To the extent that such a determination—whether called a 'finding' or an 'ad-

> judication'—finally and directly affects the substantial personal interests, I do not doubt that the Due Process Clause may require that it be accompanied by many of the traditional adjudicatory procedural safeguards. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951)."

See also *id.*, at 442. Thus, although the Court was divided on the particular procedural safeguards that would be necessary in particular circumstances, the common point of agreement, and the one that the Court today inexplicably rejects, was that the official characterization of an individual as a criminal affects a constitutional "liberty" interest.

The Court, however, relegates its discussion of *Jenkins* to a dissembling footnote. First, the Court ignores the fact that the Court in *Jenkins* clearly recognized a constitutional "liberty" or "property" interest in reputation sufficient to invoke the strictures of the Fourteenth Amendment.[13] It baffles me how, in the face of that holding, the Court can come to today's conclusion by reliance on the fact that the conduct in question does not "come within the language" of the *dissent* in *Jenkins*, *ante*, at 706 n. 4. Second, and more important, the Court's footnote manifests the same confusion that pervades the remainder of its opinion; it simply fails to recognize the crucial difference between the question whether there is a personal interest in one's good name and reputation that is constitutionally cognizable as a "liberty" or "property" interest within the Fourteenth and Fifth Amendment Due Process Clauses, and the totally separate question whether particular government

[13] Of course, such oversights are typical of today's opinion. Compare, *e. g.*, the discussions of *Goss* v. *Lopez*, 419 U. S. 565 (1975), *ante*, at 710, and n. 15, *infra;* the discussions of *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), *ante*, at 707–709, and *infra*, at 729–730.

action with respect to that interest satisfies the mandates of due process. See, *e. g., supra,* at 720–721, and n. 8. Although the dissenters in *Jenkins* thought that the Commission's procedures complied with due process, they clearly believed that there was a personal interest that had to be weighed in reaching that conclusion.[14] The dissenters in *Jenkins,* like the Court in *Hannah* v. *Larche, supra,* held the view that in the context of a *purely investigatory, factfinding agency,* full trial safeguards are not required to comply with due process. But that question would never have been reached unless there were some constitutionally cognizable personal interest making the inquiry necessary—the interest in reputation that is af-

[14] For example, in addition to the statements already quoted in text, the dissenters observed:

"The Commission thus bears close resemblance to certain federal administrative agencies . . . . These agencies have one salient feature in common, which distinguishes them from those designed simply to 'expose.' None of them is the *final* arbiter of anyone's guilt or innocence. Each, rather, plays only a *preliminary* role, designed, in the usual course of events, to *initiate* a subsequent formal proceeding in which the accused will enjoy the full panoply of procedural safeguards. For this reason, and because such agencies could not otherwise practicably pursue their investigative functions, they have not been required to follow 'adjudicatory' procedures." 395 U. S., at 439.

"Although in this respect the Commission is not different from the federal agencies discussed above, I am not ready to say that the collateral consequences of government-sanctioned opprobrium may not under some circumstances entitle a person to some right, consistent with the Commission's efficient performance of its investigatory duties, to have his public say in rebuttal. However, the Commission's procedures are far from being niggardly in this respect. . . .

". . . It may be that some of my Brethren understand the complaint to allege that in fact the Commission acts primarily as an agency of 'exposure,' rather than one which serves the ends required by the state statutes. If so—although I do not believe that the complaint can be reasonably thus construed—the area of disagreement between us may be small or nonexistent." *Id.,* at 442.

fected by public "exposure." The Court, by contrast, now implicitly repudiates a substantial body of case law and finds no such constitutionally cognizable interest in a person's reputation, thus foreclosing *any* inquiry into the procedural protections accorded that interest in a given situation.

In short, it is difficult to fathom what renders respondent's interest in his reputation somehow different from the personal interest affected by " 'an agency whose sole or predominant function, without serving any other public interest, is to expose and publicize the names of persons it finds guilty of wrongdoing.' " *Ante*, at 706 n. 4, quoting 395 U. S., at 438. Surely the difference cannot be found in the fact that police officials rather than a statutory "agency" engaged in the stigmatizing conduct, for both situations involve the requisite action "under color of" law. *Ante*, at 697 n. 2. Nor can the difference be found in the argument that petitioners' actions were "serving any other public interest," for that consideration *only* affects the outcome of the due process balance in a particular case, not whether there is a personal "liberty" interest to be weighed against the government interests supposedly justifying the State's official actions. It is remarkable that the Court, which is so determined to parse the language of other cases, see generally *ante*, Part II, can be thus oblivious to the fact that *every* Member of the Court so recently felt that the intentional, public exposure of alleged wrongdoing—like the branding of an individual as an "active shoplifter"—implicates a constitutionally protected "liberty" or "property" interest and requires analysis as to whether procedures adequate to satisfy due process were accorded the accused by the State.

Moreover, *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), which was relied on by the Court of Appeals in this case, did not rely at all on the fact asserted by the

Court today as controlling—namely, upon the fact that "posting" denied Ms. Constantineau the right to purchase alcohol for a year, *ante*, at 708–709. Rather, *Constantineau* stated: "The *only* issue present here is whether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard." 400 U. S., at 436 (emphasis supplied). In addition to the statements quoted by the Court, *ante*, at 707–708, the Court in *Constantineau* continued: " 'Posting' under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." 400 U. S., at 437. " '[T]he right to be heard before being condemned to suffer grievous loss of any kind, *even though it may not involve the stigma and hardships of a criminal conviction*, is a principle basic to our society.' " *Ibid.*, quoting *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring) (emphasis supplied). There again, the fact that government stigmatization of an individual implicates constitutionally protected interests was made plain.[15]

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[15] Even more recently, in *Goss* v. *Lopez*, 419 U. S. 565 (1975), we recognized that students may not be suspended from school without being accorded due process safeguards. We explicitly referred to "the liberty interest in reputation" implicated by such suspensions, *id.*, at 576, based upon the fact that suspension for certain actions would stigmatize the student, *id.*, at 574–575:

"The Due Process Clause also forbids arbitrary deprivations of

Thus, *Jenkins* and *Constantineau*, and the decisions upon which they relied, are cogent authority that a person's interest in his good name and reputation falls

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liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied. *Wisconsin* v. *Constantineau*, 400 U. S. 433, 437 (1971); *Board of Regents* v. *Roth*, *supra*, at 573. School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution."

The Court states that today's holding is "quite consistent" with *Goss* because "Ohio law conferred a right upon all children to attend school, and . . . the act of the school officials suspending the student there involved resulted in a denial or deprivation of that right." *Ante*, at 710. However, that was only one-half of the holding in *Goss*. The Ohio law established a *property* interest of which the Court held a student would not be deprived without being accorded due process. 419 U. S., at 573–574. However, the Court also specifically recognized that there was an independent *liberty* interest implicated in the case, not dependent upon the statutory right to attend school, but based, as noted above, on the fact that suspension for certain conduct could affect a student's "good name, reputation, honor, or integrity." *Id.*, at 574–575.

Similarly, the idea that the language in *Board of Regents* v. *Roth*, *supra*, is "quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable," *ante*, at 709, borders on the absurd. The Court in *Roth*, like the Court in *Goss*, explicitly quoted the language from *Constantineau* that the Court today denigrates, *ante*, at 707–709, and it was clear that *Roth* was focusing on stigmatization as such. We said there that when due process safeguards are required in such situations, the "purpose of such notice and hearing is to provide the person an opportunity *to clear his name*," 408 U. S., at 573 n. 12 (emphasis supplied), and only found no requirement for due process safeguards because "[i]n the present case . . . there

within the broad term "liberty" and clearly require that the government afford procedural protections before infringing that name and reputation by branding a person as a criminal. The Court is reduced to discrediting the clear thrust of *Constantineau* and *Jenkins* by excluding the interest in reputation from all constitutional protection "if there is any other possible interpretation" by which to deny their force as precedent according constitutional protection for the interest in reputation.[16] *Ante*, at 708. The Court's approach—oblivious both to Mr. Chief Justice Marshall's admonition that "we must never forget, that it is *a constitution* we are expounding," *M'Culloch* v. *Maryland*, 4 Wheat. 316, 407 (1819), and to the teaching of cases such as *Roth* and *Meyer*, which were attentive to the necessary breadth of constitutional "liberty" and "property" interests, see nn. 10, 15, *supra*—is to water down our prior precedents by reinter-

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is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake." *Id.*, at 573. See also *Arnett* v. *Kennedy*, 416 U. S., at 157 (opinion of REHNQUIST, J.) ("[L]iberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee . . . . [T]he purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name' . . ."). The fact that a stigma is imposed by the government in terminating the employment of a government employee may make the existence of state action unquestionable, but it surely does not detract from the fact that the operative "liberty" concept relates to the official stigmatization of the individual, whether imposed by the government in its status as an employer or otherwise.

[16] Similar insensitivity is exhibited by the Court when it declares that respondent "has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded." *Ante*, at 700. The gravamen of respondent's complaint is that he has been stigmatized as a criminal without *any* of the constitutional protections designed to prevent an erroneous determination of criminal culpability.

preting them as confined to injury to reputation that affects an individual's employment prospects or, as "a right or status previously recognized by state law [that the State] distinctly altered or extinguished." *Ante,* at 711. See also, *e. g., ante,* at 701, 704–706, 709–710, 710–712. The obvious answer is that such references in those cases (when there even were such references) concerned the particular fact situations presented, and in nowise implied any limitation upon the application of the principles announced, *E. g., ante,* at 709–710, quoting *Board of Regents* v. *Roth,* 408 U. S., at 573. See n. 15, *supra.* Discussions of impact upon future employment opportunities were nothing more than recognition of the logical and natural consequences flowing from the stigma condemned. *E. g., ante,* at 705–706, quoting *Cafeteria Workers* v. *McElroy,* 367 U. S., at 898.[17]

[17] The import of these cases and the obvious impact of official stigmatization as a criminal were not lost on the Court of Appeals in this case:

"This label ['active shoplifter'] carries with it the badge of disgrace of a criminal conviction. Moreover, it is a direct statement by law enforcement officials that the persons included in the flyer are presently pursuing an active course of criminal conduct. All of this was done without the slightest regard for due process. There was no notice nor opportunity to be heard prior to the distribution of the flyer, and appellant and others have never been accorded the opportunity to refute the charges in a criminal proceeding. It goes without saying that the Police Chiefs cannot determine the guilt or innocence of an accused in an administrative proceeding. Such a determination can be made only in a court of law.

"The harm is all the more apparent because the branding has been done by law enforcement officials with the full power, prestige and authority of their positions. There can be little doubt that a person's standing and associations in the community have been damaged seriously when law enforcement officials brand him an active shoplifter, accuse him of a continuing course of criminal conduct, group him with criminals and distribute his name and photograph to the merchants and businessmen of the community. Such acts are a direct and devastating attack on the good name, reputa-

Moreover, the analysis has a hollow ring in light of the Court's acceptance of the truth of the allegation that the "active shoplifter" label would "seriously impair [respondent's] future employment opportunities." *Ante*, at 697. This is clear recognition that an official "badge of infamy" affects tangible interests of the defamed individual and not merely an abstract interest in how people view him; for the "badge of infamy" has serious consequences in its impact on no less than the opportunities open to him to enjoy life, liberty, and the pursuit of happiness. It is inexplicable how the Court can say that a person's status is "altered" when the State suspends him from school, revokes his driver's license, fires him from a job, or denies him the right to purchase a drink of alcohol, but is in no way "altered" when it officially pins upon him the brand of a criminal, particularly since the Court recognizes how deleterious will be the consequences that inevitably flow from its official act. See, *e. g.*, *ante*, at 708–709, 711–712. Our precedents clearly mandate that a person's interest in his good name and reputation is cognizable as a "liberty" interest within the meaning of the Due Process Clause, and the Court has simply failed to distinguish those precedents in any rational manner in holding that no invasion of a "liberty" interest was effected in the official stigmatizing of respondent as a criminal without any "process" whatsoever.

I have always thought that one of this Court's most important roles is to provide a formidable bulwark against governmental violation of the constitutional safe-

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tion, honor and integrity of the person involved. The fact of an arrest without more may impair or cloud a person's reputation. *Michelson* v. *United States*, 335 U. S. 469, 482 . . . (1948). Such acts on the part of law enforcement officials may result in direct economic loss and restricted opportunities for schooling, employment and professional licenses. *Menard* v. *Mitchell*, 139 U. S. App. D. C. 113, 430 F. 2d 486, 490 (1970)." 505 F. 2d 1180, 1183 (1974).

guards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth. It is a regrettable abdication of that role and a saddening denigration of our majestic Bill of Rights when the Court tolerates arbitrary and capricious official conduct branding an individual as a criminal without compliance with constitutional procedures designed to ensure the fair and impartial ascertainment of criminal culpability. Today's decision must surely be a short-lived aberration.[18]

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[18] In light of my conviction that the State may not condemn an individual as a criminal without following the mandates of the trial process, I need not address the question whether there is an independent right of privacy which would yield the same result. Indeed, privacy notions appear to be inextricably interwoven with the considerations which require that a State not single an individual out for punishment outside the judicial process. Essentially, the core concept would be that a State cannot broadcast even such factual events as the occurrence of an arrest that does not culminate in a conviction when there are no legitimate law enforcement justifications for doing so, since the State is chargeable with the knowledge that many employers will treat an arrest the same as a conviction and deny the individual employment or other opportunities on the basis of a fact that has no probative value with respect to actual criminal culpability. See, *e. g.*, *Michelson* v. *United States*, 335 U. S. 469, 482 (1948); *Schware* v. *Board of Bar Examiners*, 353 U. S., at 241. A host of state and federal courts, relying on both privacy notions and the presumption of innocence, have begun to develop a line of cases holding that there are substantive limits on the power of the government to disseminate unresolved arrest records outside the law enforcement system, see, *e. g.*, *Utz* v. *Cullinane*, 172 U. S. App. D. C. 67, 520 F. 2d 467 (1975); *Tarlton* v. *Saxbe*, 165 U. S. App. D. C. 293, 507 F. 2d 1116 (1974); *United States* v. *Dooley*, 364 F. Supp. 75 (ED Pa. 1973); *Menard* v. *Mitchell*, 328 F. Supp. 718, 725–726 (DC 1971), rev'd on other grounds, 162 U. S. App. D. C. 284, 498 F. 2d 1017 (1974); *United States* v. *Kalish*, 271 F. Supp. 968 (PR 1967); *Davidson* v. *Dill*, 180 Colo. 123, 503 P. 2d 157 (1972); *Eddy* v. *Moore*, 5 Wash. App. 334, 487 P. 2d 211 (1971). I fear that after

today's decision, these nascent doctrines will never have the opportunity for full growth and analysis. Since the Court of Appeals did not address respondent's privacy claims, and since there has not been substantial briefing or oral argument on that point, the Court's pronouncements are certainly unnecessary. Of course, States that are more sensitive than is this Court to the privacy and other interests of individuals erroneously caught up in the criminal justice system are certainly free to adopt or adhere to higher standards under state law. See, *e. g.*, *Michigan* v. *Mosley*, 423 U. S. 96, 111, 120–121 (1975) (BRENNAN, J., dissenting).

MR. JUSTICE WHITE does not concur in this footnote.

Syllabus

LIBERTY MUTUAL INSURANCE CO. *v.* WETZEL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74–1245. Argued January 19, 1976—Decided March 23, 1976

Respondents filed a complaint alleging that petitioner's employee insurance benefits and maternity leave regulations discriminated against its women employees in violation of Title VII of the Civil Rights Act of 1964, and seeking injunctive relief, damages, costs, and attorneys' fees. After ruling in respondents' favor on their motion for a partial summary judgment on the issue of petitioner's liability under the Act, the District Court, upon denying petitioner's motion for reconsideration, issued an amended order stating that injunctive relief would be withheld because petitioner had filed an appeal and had asked for a stay of any injunction, and directing that, pursuant to Fed. Rule Civ. Proc. 54 (b), final judgment be entered for respondents, there being no just reason for delay. The Court of Appeals, holding that it had jurisdiction of petitioner's appeal under 28 U. S. C. § 1291, affirmed on the merits. *Held:*

1. The District Court's order was not appealable as a final decision under § 1291. Pp. 742–744.

(a) Even assuming that the order was a declaratory judgment on the issue of liability, it nevertheless left unresolved and did not finally dispose of any of the respondents' prayers for relief. P. 742.

(b) The order did not become appealable as a final decision pursuant to § 1291 merely because it made the recital required by Rule 54 (b), since that Rule applies only to multiple-claim actions in which one or more but less than all of the claims have been finally decided and are found otherwise ready for appeal, and does not apply to a single-claim action such as this one where the complaint advanced a single legal theory that was applied to only one set of facts. Pp. 742–744.

(c) The order, apart from its reference to Rule 54 (b), constitutes a grant of partial summary judgment limited to the issue of petitioner's liability, is by its terms interlocutory, and, where

damages or other relief remain to be resolved, cannot be considered "final" within the meaning of § 1291. P. 744.

2. Nor was the order appealable pursuant to 28 U. S. C. § 1292's provisions for interlocutory appeals. Pp. 744–745.

(a) Even if the order insofar as it failed to include the requested injunctive relief could be considered an interlocutory order refusing an injunction within the meaning of § 1292 (a)(1), and thus would have allowed *respondents* then to obtain review in the Court of Appeals, there was no denial of any injunction sought by *petitioner* and it could not avail itself of that grant of jurisdiction. Pp. 744–745.

(b) Even if the order could be considered as an order that the District Court certified for immediate appeal pursuant to § 1292 (b) as involving a controlling question of law as to which there was substantial ground for difference of opinion, it does not appear that petitioner applied to the Court of Appeals for permission to appeal within 10 days as required by § 1292 (b); moreover, there can be no assurance had the other requirements of § 1292 (b) been met that the Court of Appeals would have exercised its discretion to entertain the interlocutory appeal. P. 745.

511 F. 2d 199, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which all Members joined except BLACKMUN, J., who took no part in the consideration or decision of the case.

Kalvin M. Grove argued the cause for petitioner. With him on the briefs were *Lawrence M. Cohen, Jeffrey S. Goldman,* and *Robert A. Penney.*

Howard A. Specter argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging reversal were filed by *Gordon Dean Booth, Jr.,* for Alaska Airlines, Inc., et al.; by *Edward Silver, Larry M. Lavinsky, Sara S. Portnoy,* and *Kenneth L. Kimble* for the American Life Insurance Assn. et al.; by *William Martin* and *Paul C. Blume* for the American Mutual Insurance Alliance et al.; by *Thompson Powers* for the American Telephone & Telegraph Co.; by *Simon H. Rifkind, Frazer F. Hilder,* and *Edmond J. Dilworth, Jr.,* for General Motors Corp.; by *Richard D. Godown* for the National Association of Manufacturers; by *Lloyd Sutter* for Owens-Illinois,

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents filed a complaint in the United States District Court for the Western District of Pennsylvania in which they asserted that petitioner's employee insurance benefits and maternity leave regulations discriminated against women in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. IV). The District Court ruled in favor of respondents on the issue of petitioner's liability under that Act, and petitioner appealed to the Court of Appeals for the Third Circuit. That court held that it had jurisdiction of petitioner's appeal under 28 U. S. C. § 1291, and proceeded to affirm on the merits the judgment of the District Court. We

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Inc., et al.; and by *John G. Wayman* and *Scott F. Zimmerman* for Westinghouse Electric Corp.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Bork, Assistant Attorney General Pottinger, Brian K. Landsberg, Walter W. Barnett, Abner W. Sibal, Joseph T. Eddins,* and *Beatrice Rosenberg* for the United States et al.; by *Francis X. Bellotti,* Attorney General, and *Barbara J. Rouse* and *Terry Jean Seligmann,* Assistant Attorneys General, for the Commonwealth of Massachusetts et al.; by *William J. Brown,* Attorney General, and *Andrew J. Ruzicho* and *Earl M. Manz,* Assistant Attorneys General, for the State of Ohio; by *Henry Spitz* and *Paul Hartman* for the New York State Division of Human Rights; by *Ruth Bader Ginsburg, Melvin L. Wulf,* and *David Rubin* for the American Civil Liberties Union et al.; by *J. Albert Woll, Laurence Gold, Stephen I. Schlossberg,* and *John Fillion* for the American Federation of Labor and Congress of Industrial Organizations et al.; by *Diane Serafin Blank* and *Nancy E. Stanley* for Blank Goodman Kelly Rone & Stanley; by *Wendy W. Williams, Rhonda Copelon, Sylvia Roberts, Marilyn Hall Patel, Judith Lonnquist, Gladys Kessler,* and *Peter Hart Weiner* for the Center for Constitutional Rights et al.; and by *Mary K. O'Melveny, Jonathan W. Lubell, H. Howard Ostrin,* and *Charles V. Koons* for the Communication Workers of America, AFL–CIO.

granted certiorari, 421 U. S. 987 (1975), and heard argument on the merits. Though neither party has questioned the jurisdiction of the Court of Appeals to entertain the appeal, we are obligated to do so on our own motion if a question thereto exists. *Mansfield, Coldwater & Lake Michigan R. Co.* v. *Swan*, 111 U. S. 379 (1884). Because we conclude that the District Court's order was not appealable to the Court of Appeals, we vacate the judgment of the Court of Appeals with instructions to dismiss petitioner's appeal from the order of the District Court.

Respondents' complaint, after alleging jurisdiction and facts deemed pertinent to their claim, prayed for a judgment against petitioner embodying the following relief:

> "(a) requiring that defendant establish non-discriminatory hiring, payment, opportunity, and promotional plans and programs;
>
> "(b) enjoining the continuance by defendant of the illegal acts and practices alleged herein;
>
> "(c) requiring that defendant pay over to plaintiffs and to the members of the class the damages sustained by plaintiffs and the members of the class by reason of defendant's illegal acts and practices, including adjusted backpay, with interest, and an additional equal amount as liquidated damages, and exemplary damages;
>
> "(d) requiring that defendant pay to plaintiffs and to the members of the class the costs of this suit and a reasonable attorneys' fee, with interest; and
>
> "(e) such other and further relief as the Court deems appropriate." App. 19.

After extensive discovery, respondents moved for partial summary judgment only as to the issue of liability. Fed. Rule Civ. Proc. 56 (c). The District Court on January 9, 1974, finding no issues of material fact in dis-

pute, entered an order to the effect that petitioner's pregnancy-related policies violated Title VII of the Civil Rights Act of 1964. It also ruled that Liberty Mutual's hiring and promotion policies violated Title VII.[1] Petitioner thereafter filed a motion for reconsideration which was denied by the District Court. Its order of February 20, 1974, denying the motion for reconsideration, contains the following concluding language:

> "In its Order the court stated it would enjoin the continuance of practices which the court found to be in violation of Title VII. The Plaintiffs were invited to submit the form of the injunction order and the Defendant has filed Notice of Appeal and asked for stay of any injunctive order. Under these circumstances the court will withhold the issuance of the injunctive order and amend the Order previously issued under the provisions of Fed. R. Civ. P. 54 (b), as follows:
>
> "And now this 20th day of February, 1974, it is directed that final judgment be entered in favor of Plaintiffs that Defendant's policy of requiring female employees to return to work within three months of delivery of a child or be terminated is in violation of the provisions of Title VII of the Civil Rights Act of 1964; that Defendant's policy of denying disability income protection plan benefits to female employees for disabilities related to pregnancies or childbirth are [*sic*] in violation of Title VII of the Civil Rights Act of 1964 and that it is expressly directed that Judgment be entered for the

[1] The portion of the District Court's order concerning petitioner's hiring and promotion policies was separately appealed to a different panel of the Court of Appeals. The judgment rendered by the Third Circuit upon that appeal is not before us in this case. See *Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F. 2d 239, cert. denied, 421 U. S. 1011 (1975).

> Plaintiffs upon these claims of Plaintiffs' Complaint; there being no just reason for delay." 372 F. Supp. 1146, 1164.

It is obvious from the District Court's order that respondents, although having received a favorable ruling on the issue of petitioner's liability to them, received none of the relief which they expressly prayed for in the portion of their complaint set forth above. They requested an injunction, but did not get one; they requested damages, but were not awarded any; they requested attorneys' fees, but received none.

Counsel for respondents when questioned during oral argument in this Court suggested that at least the District Court's order of February 20 amounted to a declaratory judgment on the issue of liability pursuant to the provisions of 28 U. S. C. § 2201. Had respondents sought *only* a declaratory judgment, and no other form of relief, we would of course have a different case. But even if we accept respondents' contention that the District Court's order was a declaratory judgment on the issue of liability, it nonetheless left unresolved respondents' requests for an injunction, for compensatory and exemplary damages, and for attorneys' fees. It finally disposed of none of respondents' prayers for relief.

The District Court and the Court of Appeals apparently took the view that because the District Court made the recital required by Fed. Rule Civ. Proc. 54 (b) that final judgment be entered on the issue of liability, and that there was no just reason for delay, the orders thereby became appealable as a final decision pursuant to 28 U. S. C. § 1291. We cannot agree with this application of the Rule and statute in question.

Rule 54 (b) [2] "does not apply to a single claim

[2] "Judgment upon multiple claims or involving multiple parties. "When more than one claim for relief is presented in an action,

action . . . . It is limited expressly to multiple claims actions in which 'one or more but less than all' of the multiple claims have been finally decided and are found otherwise to be ready for appeal." *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427, 435 (1956).[3] Here, however, respondents set forth but a single claim: that petitioner's employee insurance benefits and maternity leave regulations discriminated against its women employees in violation of Title VII of the Civil Rights Act of 1964. They prayed for several different types of relief in the event that they sustained the allegations of their complaint, see Fed. Rule Civ. Proc. 8 (a)(3), but their complaint advanced a single legal theory which was applied to only one set of facts.[4] Thus, despite the fact that the District Court undoubtedly made the findings required

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whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

[3] Following *Mackey*, the Rule was amended to insure that orders finally disposing of some but not all of the parties could be appealed pursuant to its provisions. That provision is not implicated in this case, however, to which *Mackey*'s exposition of the Rule remains fully accurate.

[4] We need not here attempt any definitive resolution of the meaning of what constitutes a claim for relief within the meaning of the Rules. See 6 J. Moore, Federal Practice ¶¶ 54.24, 54.33 (2d ed. 1975). It is sufficient to recognize that a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief.

under the Rule, had it been applicable, those findings do not in a case such as this make the order appealable pursuant to 28 U. S. C. § 1291. See *Mackey, supra,* at 437–438.

We turn to consider whether the District Court's order might have been appealed by petitioner to the Court of Appeals under any other theory. The order, viewed apart from its discussion of Rule 54 (b), constitutes a grant of partial summary judgment limited to the issue of petitioner's liability. Such judgments are by their terms interlocutory, see Fed. Rule Civ. Proc. 56 (c), and where assessment of damages or awarding of other relief remains to be resolved have never been considered to be "final" within the meaning of 28 U. S. C. § 1291. See, *e. g., Borges* v. *Art Steel Co.,* 243 F. 2d 350 (CA2 1957); *Leonidakis* v. *International Telecoin Corp.,* 208 F. 2d 934 (CA2 1953); *Tye* v. *Hertz Drivurself Stations,* 173 F. 2d 317 (CA3 1949); *Russell* v. *Barnes Foundation,* 136 F. 2d 654 (CA3 1943). Thus the only possible authorization for an appeal from the District Court's order would be pursuant to the provisions of 28 U. S. C. § 1292.

If the District Court had granted injunctive relief but had not ruled on respondents' other requests for relief, this interlocutory order would have been appealable under § 1292 (a)(1).[5] But, as noted above, the court did not issue an injunction. It might be argued that the order of the District Court, insofar as it failed to include the injunctive relief requested by respondents, is an in-

[5] "The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

terlocutory order refusing an injunction within the meaning of § 1292 (a)(1). But even if this would have allowed *respondents* to then obtain review in the Court of Appeals, there was no denial of any injunction sought by *petitioner* and it could not avail itself of that grant of jurisdiction.

Nor was this order appealable pursuant to 28 U. S. C. § 1292 (b).[6] Although the District Court's findings made with a view to satisfying Rule 54 (b) might be viewed as substantial compliance with the certification requirement of that section, there is no showing in this record that petitioner made application to the Court of Appeals within the 10 days therein specified. And that court's holding that its jurisdiction was pursuant to § 1291 makes it clear that it thought itself obliged to consider on the merits petitioner's appeal. There can be no assurance that had the other requirements of § 1292 (b) been complied with, the Court of Appeals would have exercised its discretion to entertain the interlocutory appeal.

Were we to sustain the procedure followed here, we would condone a practice whereby a district court in virtually any case before it might render an interlocutory decision on the question of liability of the defend-

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[6] "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

ant, and the defendant would thereupon be permitted to appeal to the court of appeals without satisfying any of the requirements that Congress carefully set forth. We believe that Congress, in enacting present §§ 1291 and 1292 of Title 28, has been well aware of the dangers of an overly rigid insistence upon a "final decision" for appeal in every case, and has in those sections made ample provision for appeal of orders which are not "final" so as to alleviate any possible hardship. We would twist the fabric of the statute more than it will bear if we were to agree that the District Court's order of February 20, 1974, was appealable to the Court of Appeals.

The judgment of the Court of Appeals is therefore vacated, and the case is remanded with instructions to dismiss the petitioner's appeal.

It is so ordered.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

Syllabus

FRANKS ET AL. *v.* BOWMAN TRANSPORTATION CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74-728. Argued November 3, 1975—Decided March 24, 1976

In a class action against respondent employer and certain labor unions (of which respondent union is the successor) petitioners alleged various racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964 (Act), especially with respect to employment of over-the-road (OTR) truck drivers. After certifying the action as a class action and, *inter alia,* designating one of the classes represented by petitioner Lee as consisting of black nonemployee applicants who applied for and were denied OTR positions prior to January 1, 1972, the District Court permanently enjoined the respondents from perpetuating the discriminatory practices found to exist, and, in regard to the black applicants for OTR positions, ordered the employer to notify the members of the designated class of their right to priority consideration for such jobs. But the court declined to grant the unnamed members of the class any specific relief sought, which included an award of backpay and seniority status retroactive to the date of individual application for an OTR position. While vacating the District Court's judgment insofar as it failed to award backpay to unnamed members of the class and reversing on other grounds, the Court of Appeals affirmed the District Court's denial of any form of seniority relief, holding that such relief was barred, as a matter of law, by § 703 (h) of Title VII, which provides that it shall not be an unlawful employment practice for an employer, *inter alia,* to apply different conditions of employment pursuant to a bona fide seniority system. *Held:*

1. That petitioner Lee, the named plaintiff representing the class in question, no longer has a personal stake in the outcome of the action because he had been hired by respondent employer and later was properly discharged for cause, does not moot the case. An adverse relationship sufficient to meet the requirement that a "live controversy" remain before this Court not only obtained as to unnamed members of the class with respect to the

underlying cause of action but also continues with respect to their assertion that the relief they have received in entitlement to consideration for hiring and backpay is inadequate without further award of entitlement to seniority benefits. Pp. 752–757.

2. Section 703 (h) does not bar seniority relief to unnamed members of the class in question, who are not seeking modification or elimination of the existing seniority system but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire. The thrust of § 703 (h) is directed toward defining what is and what is not an illegal discriminatory employment practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the Act's effective date, and there is no indication in the legislative materials concerning it that § 703 (h) was intended to modify or restrict relief otherwise appropriate under the Act once an illegal discriminatory practice occurring after the Act's effective date is proved, such as a discriminatory refusal to hire as in this case. Pp. 757–762.

3. An award of seniority retroactive to the date of the individual job application is appropriate under § 706 (g) of Title VII, which, to effectuate Title VII's objective of making persons whole for injuries suffered on account of unlawful employment discrimination, vests broad equitable discretion in the federal courts to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other relief as the court deems appropriate." Merely to require respondent employer to hire the class victim of discrimination falls far short of a "make whole" remedy, and a concomitant award of the seniority credit he presumptively would have earned but for the wrongful treatment would also seem necessary absent justification for denying that relief. Without a seniority award dating from the time when he was discriminatorily refused employment, an individual who applies for and obtains employment as an OTR driver pursuant to the District Court's order will never obtain his rightful place in the hierarchy of seniority according to which various employment benefits are distributed. Pp. 762–770.

4. Denial of seniority relief for the unnamed class members cannot be justified as within the District Court's discretion on

the grounds given by that court that such individuals had not filed administrative charges with the Equal Employment Opportunity Commission under Title VII and that there was no evidence of a "vacancy, qualification, and performance" for every individual member of the class. Nor can the denial of such relief be justified as within the District Court's discretion on the ground that an award of retroactive seniority to the class of discriminatees will conflict with the economic interests of other employees of respondent employer. The District Court made no mention of such considerations in denying relief, and to deny relief on such a ground would, if applied generally, frustrate the "make whole" objective of Title VII. Pp. 770–779.

495 F. 2d 398, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined, and in Part I of which POWELL, J., joined. BURGER, C. J., filed an opinion concurring in part and dissenting in part, *post*, p. 780. POWELL, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, J., joined, *post*, p. 781. STEVENS, J., took no part in the consideration or decision of the case.

Morris J. Baller argued the cause for petitioners. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Barry L. Goldstein, Eric Schnapper, John R. Myer,* and *Elizabeth R. Rindskopf.*

William M. Pate argued the cause and filed a brief for respondent Bowman Transportation Co., Inc.

Michael H. Gottesman argued the cause for respondent United Steelworkers of America. With him on the joint briefs for this respondent and for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal were *Elliot Bredhoff, Robert M. Weinberg, Bernard Kleiman, Carl Frankel, Jerome A. Cooper, James W. Dorsey, J. Albert Woll,* and *Laurence Gold.**

**Gerard C. Smetana, Jerry Kronenberg, Howard L. Mocerf, Mil-*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether identifiable applicants who were denied employment because of race after the effective date and in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. IV), may be awarded seniority status retroactive to the dates of their employment applications.[1]

Petitioner Franks brought this class action in the United States District Court for the Northern District of Georgia against his former employer, respondent Bowman Transportation Co., and his unions, the International Union of District 50, Allied and Technical Workers of the United States and Canada, and its local, No. 13600,[2] alleging various racially discriminatory employment practices in violation of Title VII. Petitioner Lee intervened on behalf of himself and others similarly situated alleging racially discriminatory hiring and dis-

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ton Smith, and *Richard Berman* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Solicitor General Bork, Assistant Attorney General Pottinger, Mark L. Evans, Brian K. Landsberg, David L. Rose, Julia P. Cooper, Joseph T. Eddins*, and *Beatrice Rosenberg* for the United States et al.; and by *Joseph L. Rauh, Jr., John Silard, Elliott C. Lichtman, John A. Fillion, Stephen I. Schlossberg, Jordan Rossen, M. Jay Whitman*, and *Herbert L. Segal* for Local 862, United Automobile Workers.

[1] Petitioners also alleged an alternative claim for relief for violations of 42 U. S. C. § 1981. In view of our decision we have no occasion to address that claim.

[2] In 1972, the International Union of District 50 merged with the United Steelworkers of America, AFL–CIO, and hence the latter as the successor bargaining representative is the union respondent before this Court. Brief for Respondent United Steelworkers of America, AFL–CIO, and for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 5.

charge policies limited to Bowman's employment of over-the-road (OTR) truck drivers. Following trial, the District Court found that Bowman had engaged in a pattern of racial discrimination in various company policies, including the hiring, transfer, and discharge of employees, and found further that the discriminatory practices were perpetrated in Bowman's collective-bargaining agreement with the unions. The District Court certified the action as a proper class action under Fed. Rule Civ. Proc. 23 (b) (2) and, of import to the issues before this Court, found that petitioner Lee represented all black applicants who sought to be hired or to transfer to OTR driving positions prior to January 1, 1972. In its final order and decree, the District Court subdivided the class represented by petitioner Lee into a class of black nonemployee applicants for OTR positions prior to January 1, 1972 (class 3), and a class of black employees who applied for transfer to OTR positions prior to the same date (class 4).

In its final judgment entered July 14, 1972, the District Court permanently enjoined the respondents from perpetuating the discriminatory practices found to exist, and, in regard to the black applicants for OTR positions, ordered Bowman to notify the members of both subclasses within 30 days of their right to priority consideration for such jobs. The District Court declined, however, to grant to the unnamed members of classes 3 and 4 any other specific relief sought, which included an award of backpay and seniority status retroactive to the date of individual application for an OTR position.

On petitioners' appeal to the Court of Appeals for the Fifth Circuit, raising for the most part claimed inadequacy of the relief ordered respecting unnamed members of the various subclasses involved, the Court of Appeals affirmed in part, reversed in part, and vacated in part. 495 F. 2d 398 (1974). The Court of Appeals

held that the District Court had exercised its discretion under an erroneous view of law insofar as it failed to award backpay to the unnamed class members of both classes 3 and 4, and vacated the judgment in that respect. The judgment was reversed insofar as it failed to award any seniority remedy to the members of class 4 who after the judgment of the District Court sought and obtained priority consideration for transfer to OTR positions.[3] As respects unnamed members of class 3—nonemployee black applicants who applied for and were denied OTR positions prior to January 1, 1972—the Court of Appeals affirmed the District Court's denial of any form of seniority relief. Only this last aspect of the Court of Appeals' judgment is before us for review under our grant of the petition for certiorari. 420 U. S. 989 (1975).

I

Respondent Bowman raises a threshold issue of mootness. The District Court found that Bowman had hired petitioner Lee, the sole-named representative of class 3, and had subsequently properly discharged him for cause,[4] and the Court of Appeals affirmed. Bowman argues that since Lee will not in any event be eligible

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[3] In conjunction with its directions to the District Court regarding seniority relief for the members of other subclasses not involved in the issues presently confronting this Court, the Court of Appeals directed that class 4 members who transferred to OTR positions under the District Court's decree should be allowed to carry over all accumulated company seniority for all purposes in the OTR department. 495 F. 2d, at 417.

[4] The District Court determined that Lee first filed his employment application with Bowman on January 13, 1970, and was discriminatorily refused employment at that time. Lee was later hired by Bowman on September 18, 1970, after he had filed a complaint with the Equal Employment Opportunity Commission. The District Court awarded Lee $6,124.58 as backpay for the intervening period of discrimination.

for any hiring relief in favor of OTR nonemployee discriminatees, he has no personal stake in the outcome and therefore the question whether nonemployee discriminatees are entitled to an award of seniority when hired in compliance with the District Court order is moot. Bowman relies on *Sosna* v. *Iowa*, 419 U. S. 393 (1975), and *Board of School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975). That reliance is misplaced.

Sosna involved a challenge to a one-year residency requirement in a state divorce statute. The District Court properly certified the action as a class action. However, before the case reached this Court, the named representative satisfied the state residency requirement (and had in fact obtained a divorce in another State). 419 U. S., at 398, and n. 7. Although the named representative no longer had a personal stake in the outcome, we held that "[w]hen the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the named representative]," *id.*, at 399, and, accordingly the "cases or controversies" requirement of Art. III of the Constitution was satisfied. *Id.*, at 402.[5]

It is true as Bowman emphasizes that *Sosna* was an instance of the "capable of repetition, yet evading review" aspect of the law of mootness. *Id.*, at 399–401. And that aspect of *Sosna* was remarked in *Board of School Comm'rs* v. *Jacobs*, *supra*, a case which was held to

[5] "There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case. . . . The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Sosna*, 419 U. S., at 402 (footnotes omitted).

be moot.[6] But nothing in our *Sosna* or *Board of School Comm'rs* opinions holds or even intimates that the fact that the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot unless there remains an issue "capable of repetition, yet evading review." [7] Insofar as the concept of mootness defines constitutionally minimal conditions for the invocation of federal judicial power, its meaning and scope, as with all concepts of justiciability, must be derived from the fundamental policies informing the "cases or controversies" limitation imposed by Art. III.

> "As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied

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[6] In *Board of School Comm'rs* v. *Jacobs*, the named plaintiffs no longer possessed a personal stake in the outcome at the time the case reached this Court for review. As the action had not been properly certified as a class action by the District Court, we held it moot. 420 U. S., at 129.

[7] To the contrary, *Sosna*, 419 U. S., at 401 n. 10, cited with approval two Courts of Appeals decisions not involving "evading review" issues which held, in circumstances less compelling than those presented by the instant case, that Title VII claims of unnamed class members are not automatically mooted merely because the named representative is determined to be ineligible for relief for reasons peculiar to his individual claim. *Roberts* v. *Union Co.*, 487 F. 2d 387 (CA6 1973); *Moss* v. *Lane Co.*, 471 F. 2d 853 (CA4 1973). In the *Moss* case, the Court of Appeals for the Fourth Circuit followed its prior decision in *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 1377, cert. denied, 409 U. S. 982 (1972). That case involved circumstances similar to those before us. There the named representative had proved his personal § 1981 claim against his former employer but was, for reasons special to himself, determined to be ineligible for the Title VII relief sought on behalf of himself and the class of discriminatees he represented.

> in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast* v. *Cohen*, 392 U. S. 83, 94–95 (1968).

There can be no question that this certified class action "clearly presented" the District Court and the Court of Appeals "with a case or controversy in every sense contemplated by Art. III of the Constitution." *Sosna, supra*, at 398. Those courts were presented with the seniority question "in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast, supra*, at 95. The only constitutional mootness question is therefore whether, with regard to the seniority issues presented, "a live controversy [remains] at the time this Court reviews the case." *Sosna, supra*, at 402.

The unnamed members of the class are entitled to the relief already afforded Lee, hiring and backpay, and thus to that extent have "such a personal stake in the outcome of the controversy [whether they are also entitled to seniority relief] as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). Given a properly certified class action, *Sosna* contemplates that mootness turns on whether, in the specific circumstances of the given case at the time it is before this Court, an adversary relationship sufficient to

fulfill this function exists.[8] In this case, that adversary relationship obviously obtained as to unnamed class members with respect to the underlying cause of action and also continues to obtain as respects their assertion that the relief they have received in entitlement to consideration for hiring and backpay is inadequate without further award of entitlement to seniority benefits. This becomes crystal clear upon examination of the circumstances and the record of this case.

The unnamed members of the class involved are identifiable individuals, individually named in the record. Some have already availed themselves of the hiring relief ordered by the District Court and are presently employed as OTR drivers by Bowman. Tr. of Oral Arg. 23. The conditions of that employment are now and so far as can be foreseen will continue to be partially a function of their status in the seniority system. The rights of other members of the class to employment under the District Court's orders are currently the subject of further litigation in that court. *Id.*, at 15. No questions are raised concerning the continuing desire of any of these class members for the seniority relief presently in issue. No questions are raised concerning the tenacity and competence of their counsel in pursuing that mode of legal relief before this Court. It follows that there is no meaningful sense in which a "live controversy" reflecting the issues before the Court could

[8] Thus, the "capable of repetition, yet evading review" dimension of *Sosna* must be understood in the context of mootness as one of the policy rules often invoked by the Court "to avoid passing prematurely on constitutional questions. Because [such] rules operate in 'cases confessedly within [the Court's] jurisdiction' . . . they find their source in policy, rather than purely constitutional, considerations." *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). See also, *id.*, at 120 n. 8 (Harlan, J., dissenting); *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring).

be found to be absent.[9] Accordingly, Bowman's mootness argument has no merit.

II

In affirming the District Court's denial of seniority relief to the class 3 group of discriminatees, the Court of Appeals held that the relief was barred by § 703 (h) of Title VII, 42 U. S. C. § 2000e–2 (h). We disagree. Section 703 (h) provides in pertinent part:

> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ."

The Court of Appeals reasoned that a discriminatory refusal to hire "does not affect the bona fides of the seniority system. Thus, the differences in the benefits and conditions of employment which a seniority system accords to older and newer employees is protected [by § 703 (h)] as 'not an unlawful employment practice.'" 495 F. 2d, at 417. Significantly, neither Bowman nor the unions undertake to defend the Court of Appeals' judgment on that ground. It is clearly erroneous.

The black applicants for OTR positions composing class 3 are limited to those whose applications were put

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[9] Nor are there present in the instant case nonconstitutional policy considerations, n. 8, *supra*, mitigating against review by this Court at the present time. Indeed, to "split up" the underlying case and require that the individual class members begin anew litigation on the sole issue of seniority relief would be destructive of the ends of judicial economy and would postpone indefinitely relief which under the law may already be long overdue.

in evidence at the trial.[10] The underlying legal wrong affecting them is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask for modification or elimination of the existing seniority system, but only for an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire. It is this context that must shape our determination as to the meaning and effect of § 703 (h).

On its face, § 703 (h) appears to be only a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not.[11] Section 703 (h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706 (g), 42 U. S. C. § 2000e–5 (g), in circumstances where an illegal discriminatory act or practice is found. Further, the legislative history of § 703 (h) plainly negates its reading as limit-

[10] By its terms, the judgment of the District Court runs to all black applicants for OTR positions prior to January 1, 1972, and is not qualified by a limitation that the discriminatory refusal to hire must have taken place after the effective date of the Act. However, only post-Act victims of racial discrimination are members of class 3. Title VII's prohibition on racial discrimination in hiring became effective on July 2, 1965, one year after the date of its enactment. Pub. L. 88–352, §§ 716 (a)–(b), 78 Stat. 266. Petitioners sought relief in this case for identifiable applicants for OTR positions "whose applications were put in evidence at the trial." App. 20a. There were 206 unhired black applicants prior to January 1, 1972, whose written applications are summarized in the record and none of the applications relates to years prior to 1970. *Id.*, at 52a, Table VA.

[11] See Last Hired, First Fired Seniority, Layoffs, and Title VII: Questions of Liability and Remedy, 11 Col. J. L. & Soc. Prob. 343, 376, 378 (1975).

ing or qualifying the relief authorized under § 706 (g). The initial bill reported by the House Judiciary Committee as H. R. 7152 [12] and passed by the full House on February 10, 1964,[13] did not contain § 703 (h). Neither the House bill nor the majority Judiciary Committee Report [14] even mentioned the problem of seniority. That subject thereafter surfaced during the debate of the bill in the Senate. This debate prompted Senators Clark and Case to respond to criticism that Title VII would destroy existing seniority systems by placing an interpretive memorandum in the Congressional Record. The memorandum stated: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." 110 Cong. Rec. 7213 (1964).[15] Senator Clark also placed in the Congressional Record a Justice Department statement concerning Title VII which stated: "[I]t has been asserted that Title VII would undermine vested rights of seniority. This is not

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[12] See H. R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

[13] 110 Cong. Rec. 2804 (1964).

[14] H. R. Rep. No. 914, *supra*.

[15] The full text of the memorandum pertaining to seniority states:

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)"

correct. Title VII would have no effect on seniority rights existing at the time it takes effect." *Id.*, at 7207.[16] Several weeks thereafter, following several in-

[16] The full text of the statement pertinent to seniority reads:

"First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." 110 Cong. Rec. 7207 (1964).

Senator Clark also introduced into the Congressional Record a set of answers to a series of questions propounded by Senator Dirksen. Two of these questions and answers are pertinent to the issue of seniority:

"Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his

formal conferences among the Senate leadership, the House leadership, the Attorney General and others, see Vaas, Title VII: Legislative History, 7 B. C. Ind. & Com. L. Rev. 431, 445 (1966), a compromise substitute bill prepared by Senators Mansfield and Dirksen, Senate majority and minority leaders respectively, containing § 703 (h) was introduced on the Senate floor.[17] Although the Mansfield-Dirksen substitute bill, and hence § 703 (h), was not the subject of a committee report, see generally Vaas, *supra*, Senator Humphrey, one of the informal conferees, later stated during debate on the substitute that § 703 (h) was not designed to alter the meaning of Title VII generally but rather "merely clarifies its present intent and effect." 110 Cong. Rec. 12723 (1964). Accordingly, whatever the exact meaning and scope of § 703 (h) in light of its unusual legislative history and the absence of the usual legislative materials, see Vaas, *supra*, at 457–458, it is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. There is no indication in the legislative materials that § 703 (h) was intended to modify or re-

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contract requires they be first fired and the remaining employees are white?

"Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race.

"Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority?

"Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists." *Id.*, at 7217.

[17] *Id.*, at 11926, 11931.

strict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved—as in the instant case, a discriminatory refusal to hire. This accords with the apparently unanimous view of commentators, see Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1632 (1969); Stacy, Title VII Seniority Remedies in a Time of Economic Downturn, 28 Vand. L. Rev. 487, 506 (1975).[18] We therefore hold that the Court of Appeals erred in concluding that, as a matter of law, § 703 (h) barred the award of seniority relief to the unnamed class 3 members.

III

There remains the question whether an award of seniority relief is appropriate under the remedial provisions of Title VII, specifically, § 706 (g).[19]

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[18] Cf. Gould, Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964, 13 How. L. J. 1, 8–9, and n. 32 (1967); see also *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F. 2d 1038 (CA3), vacated and remanded on other grounds, 414 U. S. 970 (1973), wherein the court awarded back seniority in a case of discriminatory hiring after the effective date of Title VII without any discussion of the impact of § 703 (h) on the propriety of such a remedy.

[19] Section 706 (g) of Title VII, 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. IV), provides:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems

We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin, *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971), and ordained that its policy of outlawing such discrimination should have the "highest priority," *Alexander, supra,* at 47; *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968). Last Term's *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), consistently with the congressional plan, held that one of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418. To effectuate this "make whole" objective, Congress in § 706 (g) vested broad equitable discretion in the federal courts to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate." The legislative history sup-

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appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e–3 (a) of this title."

porting the 1972 amendments of § 706 (g) of Title VII [20] affirms the breadth of this discretion. "The provisions of [§ 706 (g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. . . . [T]he Act is intended to make the victims of unlawful employment discrimination whole, and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." Section-by-Section Analysis of H. R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972). This is emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring.[21] Adequate relief may well be

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[20] Equal Employment Opportunity Act of 1972, 86 Stat. 103, amending 42 U. S. C. § 2000e *et seq.*

[21] It is true that backpay is the only remedy specifically mentioned in § 706 (g). But to draw from this fact and other sections of the statute, *post*, at 789–793, any implicit statement by Congress that seniority relief is a prohibited, or at least less available, form of remedy is not warranted. Indeed, any such contention necessarily disregards the extensive legislative history underlying the 1972 amendments to Title VII. The 1972 amendments added the phrase speaking to "other equitable relief" in § 706 (g). The Senate Report manifested an explicit concern with the "earnings gap" presently existing between black and white employees in American society. S. Rep. No. 92–415, p. 6 (1971). The Reports of both Houses of Congress indicated that "rightful place" was the intended objective of Title VII and the relief accorded thereunder. *Ibid.*; H. R. Rep. No. 92–238, p. 4 (1971). As indicated, *infra*, at 767–768, and n. 28, rightful-place seniority, implicating an employee's

denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of

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future earnings, job security, and advancement prospects, is absolutely essential to obtaining this congressionally mandated goal.

The legislative history underlying the 1972 amendments completely answers the argument that Congress somehow intended seniority relief to be less available in pursuit of this goal. In explaining the need for the 1972 amendments, the Senate Report stated:

"Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements." S. Rep. No. 92–415, *supra,* at 5.

See also H. R. Rep. No. 92–238, *supra,* at 8. In the context of this express reference to seniority, the Reports of both Houses cite with approval decisions of the lower federal courts which granted forms of retroactive "rightful place" seniority relief. S. Rep. No. 92–415, *supra,* at 5 n. 1; H. R. Rep. No. 92–238, *supra,* at 8 n. 2. (The dissent, *post,* at 796–797, n. 18, would distinguish these lower federal court decisions as not involving instances of discriminatory *hiring.* Obviously, however, the concern of the entire thrust of the dissent—the impact of rightful-place seniority upon the expectations of other employees—is in no way a function of the specific type of illegal discriminatory practice upon which the judgment of liability is predicated.) Thereafter, in language that could hardly be more explicit, the analysis accompanying the Conference Report stated:

"In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed *that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.*" Section-By-Section Analysis of H. R. 1746, accompanying The Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166 (1972) (emphasis added).

his application. It can hardly be questioned that ordinarily such relief will be necessary to achieve the "make-whole" purposes of the Act.

Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management 104–115 (1960). Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority). *Ibid.* We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey* v. *Moore*, 375 U. S. 335, 346–347 (1964). "More than any other provision of the collective[-bargaining] agreement . . . seniority affects the economic security of the individual employee covered by its terms." Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1535 (1962). "Competitive status" seniority also often plays a broader role in modern employment systems, particularly systems operated under collective-bargaining agreements:

> "Included among the benefits, options, and safeguards affected by competitive status seniority, are not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, 'bumping' possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff

> recall rights will withstand, overtime opportunities, parking privileges, and, in one plant, a preferred place in the punch-out line." Stacy, 28 Vand. L. Rev., *supra,* at 490 (footnotes omitted).

Seniority standing in employment with respondent Bowman, computed from the departmental date of hire, determines the order of layoff and recall of employees.[22] Further, job assignments for OTR drivers are posted for competitive bidding and seniority is used to determine the highest bidder.[23] As OTR drivers are paid on a per-mile basis,[24] earnings are therefore to some extent a function of seniority. Additionally, seniority computed from the company date of hire determines the length of an employee's vacation [25] and pension benefits.[26] Obviously merely to require Bowman to hire the class 3 victim of discrimination falls far short of a "make whole" remedy.[27] A concomitant award of the seniority credit he presumptively would have earned but for the wrongful treatment would also seem necessary in the absence of justification for denying that relief. Without an award of seniority dating from the time when he was discriminatorily refused employment, an indi-

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[22] App. 46a–50a.

[23] *Ibid.*

[24] 2 Record 161.

[25] App. 47a, 51a.

[26] 2 Record 169.

[27] Further, at least in regard to "benefit"-type seniority such as length of vacation leave and pension benefits in the instant case, any general bar to the award of retroactive seniority for victims of illegal hiring discrimination serves to undermine the mutually reinforcing effect of the dual purposes of Title VII; it reduces the restitution required of an employer at such time as he is called upon to account for his discriminatory actions perpetrated in violation of the law. See *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 417–418 (1975).

vidual who applies for and obtains employment as an OTR driver pursuant to the District Court's order will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors.[28]

The Court of Appeals apparently followed this reasoning in holding that the District Court erred in not granting seniority relief to class 4 Bowman employees who were discriminatorily refused transfer to OTR positions. Yet the class 3 discriminatees in the absence of a comparable seniority award would also remain subordinated in the seniority system to the class 4 discriminatees. The distinction plainly finds no support anywhere in Title VII or its legislative history. Settled law dealing with the related "twin" areas of discriminatory hiring and discharges violative of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*, provides a persuasive analogy. "[I]t would indeed be surprising if Congress gave a remedy for the one which it denied for the other."

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[28] Accordingly, it is clear that the seniority remedy which petitioners seek does not concern only the "make whole" purposes of Title VII. The dissent errs in treating the issue of seniority relief as implicating only the "make whole" objective of Title VII and in stating that "Title VII's 'primary objective' of eradicating discrimination is not served at all . . . ." *Post*, at 788. Nothing could be further from reality—the issue of seniority relief cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination in a way that backpay, for example, can never do. "[S]eniority, after all, is a right which a worker exercises in each job movement in the future, rather than a simple one-time payment for the past." Poplin, Fair Employment in a Depressed Economy: The Layoff Problem, 23 U. C. L. A. L. Rev. 177, 225 (1975).

Phelps Dodge Corp. v. *NLRB*, 313 U. S. 177, 187 (1941). For courts to differentiate without justification between the classes of discriminatees "would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed." *Id.*, at 188.

Similarly, decisions construing the remedial section of the National Labor Relations Act, § 10 (c), 29 U. S. C. § 160 (c)—the model for § 706 (g), *Albemarle Paper*, 422 U. S., at 419 [29]—make clear that remedies constituting authorized "affirmative action" include an award of seniority status, for the thrust of "affirmative action" redressing the wrong incurred by an unfair labor practice is to make "the employees whole, and thus restor[e] the economic status quo that would have obtained but for the company's wrongful [act]." *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U. S. 258, 263 (1969). The task of the NLRB in applying § 10 (c) is "to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." *Carpenters* v. *NLRB*, 365 U. S. 651, 657 (1961) (Harlan, J., concurring). And the NLRB has often required that the hiring of employees who have been discriminatorily refused employment be accompanied by an award of seniority equivalent to that which

[29] To the extent that there is a difference in the wording of the respective provisions, § 706 (g) grants, if anything, broader discretionary powers than those granted the National Labor Relations Board. Section 10 (c) of the NLRA authorizes "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter," 29 U. S. C. § 160 (c), whereas § 706 (g) as amended in 1972 authorizes "such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement *or hiring* of employees, with or without back pay . . . , *or any other equitable relief as the court deems appropriate*." 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. IV) (emphasis added).

they would have enjoyed but for the illegal conduct. See, *e. g., In re Phelps Dodge Corp.*, 19 N. L. R. B. 547, 600, and n. 39, 603–604 (1940), modified on other grounds, 313 U. S. 177 (1941) (ordering persons discriminatorily refused employment hired "without prejudice to their seniority or other rights and privileges"); *In re Nevada Consolidated Copper Corp.*, 26 N. L. R. B. 1182, 1235 (1940), enforced, 316 U. S. 105 (1942) (ordering persons discriminatorily refused employment hired with "any seniority or other rights and privileges they would have acquired, had the respondent not unlawfully discriminated against them"). Plainly the "affirmative action" injunction of § 706 (g) has no lesser reach in the district courts. "Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Albemarle Paper, supra,* at 418.

IV

We are not to be understood as holding that an award of seniority status is requisite in all circumstances. The fashioning of appropriate remedies invokes the sound equitable discretion of the district courts. Respondent Bowman attempts to justify the District Court's denial of seniority relief for petitioners as an exercise of equitable discretion, but the record is its own refutation of the argument.

Albemarle Paper, supra, at 416, made clear that discretion imports not the court's "'inclination, but . . . its judgment; and its judgment is to be guided by sound legal principles.'" Discretion is vested not for purposes of "limit[ing] appellate review of trial courts, or . . . invit[ing] inconsistency and caprice," but rather to allow the most complete achievement of the objectives

of Title VII that is attainable under the facts and circumstances of the specific case. 422 U. S., at 421. Accordingly the District Court's denial of any form of seniority remedy must be reviewed in terms of its effect on the attainment of the Act's objectives under the circumstances presented by this record. No less than with the denial of the remedy of backpay, the denial of seniority relief to victims of illegal racial discrimination in hiring is permissible "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Ibid.*

The District Court stated two reasons for its denial of seniority relief for the unnamed class members.[30] The first was that those individuals had not filed administrative charges under the provisions of Title VII with the Equal Employment Opportunity Commission and therefore class relief of this sort was not appropriate. We rejected this justification for denial of class-based relief in the context of backpay awards in *Albemarle Paper*, and for the same reasons reject it here. This justification for denying class-based relief in Title VII suits has been unanimously rejected by the courts of appeals, and Congress ratified that construction by the 1972 amendments. *Albemarle Paper, supra,* at 414 n. 8.

The second reason stated by the District Court was that such claims "presuppose a vacancy, qualification,

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[30] Since the Court of Appeals concluded that an award of retroactive seniority to the unnamed members of class 3 was barred by § 703 (h), a conclusion which we today reject, the court did not address specifically the District Court's stated reasons for refusing the relief. The Court of Appeals also stated, however, that the District Court did not "abuse its discretion" in refusing such relief, 495 F. 2d 398, 418 (1974), and we may therefore appropriately review the validity of the District Court's reasons.

and performance by every member. There is no evidence on which to base these multiple conclusions." Pet. for Cert. A54. The Court of Appeals rejected this reason insofar as it was the basis of the District Court's denial of backpay, and of its denial of retroactive seniority relief to the unnamed members of class 4. We hold that it is also an improper reason for denying seniority relief to the unnamed members of class 3.

We read the District Court's reference to the lack of evidence regarding a "vacancy, qualification, and performance" for every individual member of the class as an expression of concern that some of the unnamed class members (unhired black applicants whose employment applications were summarized in the record) may not in fact have been actual victims of racial discrimination. That factor will become material however only when those persons reapply for OTR positions pursuant to the hiring relief ordered by the District Court. Generalizations concerning such individually applicable evidence cannot serve as a justification for the denial of relief to the entire class. Rather, at such time as individual class members seek positions as OTR drivers, positions for which they are presumptively entitled to priority hiring consideration under the District Court's order,[31] evidence that particular individuals were not in fact victims of racial discrimination will be material. But petitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination.

[31] The District Court order is silent as to whether applicants for OTR positions who were previously discriminatorily refused employment must be presently qualified for those positions in order to be eligible for priority hiring under that order. The Court of Appeals, however, made it plain that they must be. *Id.*, at 417. We agree.

Cf. *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973); *Baxter* v. *Savannah Sugar Rfg. Corp.*, 495 F. 2d 437, 443-444 (CA5), cert. denied, 419 U. S. 1033 (1974).[32] Only if this burden is met may retroactive seniority—if otherwise determined to be an appropriate form of relief under the circumstances of the particular case—be denied individual class members.

Respondent Bowman raises an alternative theory of justification. Bowman argues that an award of retroactive seniority to the class of discriminatees will conflict with the economic interests of other Bowman employees. Accordingly, it is argued, the District Court acted within its discretion in denying this form of relief as an attempt to accommodate the competing interests of the various groups of employees.[33]

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[32] Thus Bowman may attempt to prove that a given individual member of class 3 was not in fact discriminatorily refused employment as an OTR driver in order to defeat the individual's claim to seniority relief as well as any other remedy ordered for the class generally. Evidence of a lack of vacancies in OTR positions at the time the individual application was filed, or evidence indicating the individual's lack of qualification for the OTR positions—under nondiscriminatory standards *actually applied* by Bowman to individuals who were in fact hired—would of course be relevant. It is true, of course, that obtaining the third category of evidence with which the District Court was concerned—what the individual discriminatee's job performance would have been but for the discrimination—presents great difficulty. No reason appears, however, why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue.

[33] Even by its terms, this argument could apply only to the award of retroactive seniority for purposes of "competitive status" benefits. It has no application to a retroactive award for purposes of "benefit" seniority—extent of vacation leave and pension benefits. Indeed, the decision concerning the propriety of this latter type of seniority relief is analogous, if not identical, to the decision concerning an award of backpay to an individual discriminatee hired pursuant to an order redressing previous employment discrimination.

We reject this argument for two reasons. First, the District Court made no mention of such considerations in its order denying the seniority relief. As we noted in *Albemarle Paper*, 422 U. S., at 421 n. 14, if the district court declines, due to the peculiar circumstances of the particular case, to award relief generally appropriate under Title VII, "[i]t is necessary . . . that . . . it carefully articulate its reasons" for so doing. Second, and more fundamentally, it is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make whole" objective of Title VII. These conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But, as we have said, there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination, and the experience under its remedial model in the National Labor Relations Act points to the contrary.[34] Accord-

[34] With all respect, the dissent does not adequately treat with and fails to distinguish, *post*, at 796–799, the standard practice of the National Labor Relations Board granting retroactive seniority relief under the National Labor Relations Act to persons discriminatorily discharged or refused employment in violation of the Act. The Court in *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 196 (1941), of course, made reference to "restricted judicial review" as that case arose in the context of review of the policy determinations of an independent administrative agency, which are traditionally accorded a wide-ranging discretion under accepted principles of judicial review. "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion." *Id.*, at 194. As we made clear in *Albemarle Paper*, however, the pertinent point is that in utilizing the NLRA as the remedial model for Title VII, reference

ingly, we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 663 (CA2 1971).[35]

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must be made to actual operation and experience as it has evolved in administering the Act. *E. g.*, "We may assume that Congress was aware that the Board, since its inception, has awarded backpay as a matter of course." 422 U. S., at 419–420. "[T]he Board has from its inception pursued 'a practically uniform policy with respect to these orders requiring affirmative action.'" *Id.*, at 420 n. 12.

The dissent has cited no case, and our research discloses none, wherein the Board has ordered hiring relief and yet withheld the remedy of retroactive seniority status. Indeed, the Court of Appeals for the First Circuit has noted that a Board order requiring hiring relief "without prejudice to . . . seniority and other rights and privileges" is "language . . . in the standard form which has long been in use by the Board." *NLRB* v. *Draper Corp.*, 159 F. 2d 294, 296–297, and n. 1 (1947). The Board "routinely awards both back pay and retroactive seniority in hiring discrimination cases." Poplin, *supra*, n. 28, at 223. See also Edwards & Zaretsky, Preferential Remedies for Employment Discrimination, 74 Mich. L. Rev. 1, 45 n. 224 (1975) (a "common remedy"); Last Hired, First Fired Seniority, Layoffs and Title VII, *supra*, n. 11, at 377 ("traditionally and uniformly required"). This also is a "presumption" in favor of this form of seniority relief. If victims of racial discrimination are under Title VII to be treated differently and awarded less protection than victims of unfair labor practice discrimination under the NLRA, some persuasive justification for such disparate treatment should appear. That no justification exists doubtless explains the position of every union participant in the proceedings before the Court in the instant case arguing for the conclusion we have reached.

[35] See also *Vogler* v. *McCarty, Inc.*, 451 F. 2d 1236, 1238–1239 (CA5 1971):

"Adequate protection of Negro rights under Title VII may necessi-

With reference to the problems of fairness or equity respecting the conflicting interests of the various groups of employees, the relief which petitioners seek is only seniority status retroactive to the date of individual application, rather than some form of arguably more complete relief.[36] No claim is asserted that nondiscriminatee employees holding OTR positions they would not have obtained but for the illegal discrimination should be deprived of the seniority status they have earned. It is therefore clear that even if the seniority relief petitioners seek is awarded, most if not all discriminatees who actually obtain OTR jobs under the court order will not truly be restored to the actual seniority that would have existed in the absence of the illegal discrimination. Rather, most discriminatees even under an award of retroactive seniority status will still remain subordinated in the hierarchy to a position inferior to that of a greater total number of employees than would have been the case in the absence of dis-

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tate, as in the instant case, some adjustment of the rights of white employees. The Court must be free to deal equitably with conflicting interests of white employees in order to shape remedies that will most effectively protect and redress the rights of the Negro victims of discrimination."

[36] Another countervailing factor in assessing the expected impact on the interests of other employees actually occasioned by an award of the seniority relief sought is that it is not probable in instances of class-based relief that all of the victims of the past racial discrimination in hiring will actually apply for and obtain the prerequisite hiring relief. Indeed, in the instant case, there appear in the record the rejected applications of 166 black applicants who claimed at the time of application to have had the necessary job qualifications. However, the Court was informed at oral argument that only a small number of those individuals have to this date actually been hired pursuant to the District Court's order ("five, six, seven, something in that order"), Tr. of Oral Arg. 23, although ongoing litigation may ultimately determine more who desire the hiring relief and are eligible for it. *Id.*, at 15.

crimination. Therefore, the relief which petitioners seek, while a more complete form of relief than that which the District Court accorded, in no sense constitutes "complete relief." [37] Rather, the burden of the past discrimination in hiring is with respect to competitive status benefits divided among discriminatee and nondiscriminatee employees under the form of relief sought. The dissent criticizes the Court's result as not sufficiently cognizant that it will "directly implicate the rights and expectations of perfectly innocent employees." *Post,* at 788. We are of the view, however, that the result which we reach today—which, standing alone,[38] establishes that a sharing of the burden of the past discrimination is presumptively necessary—is entirely consistent with any fair characterization of equity jurisdiction,[39] particu-

[37] In no way can the remedy established as presumptively necessary be characterized as "total restitution," *post,* at 791 n. 9, or as deriving from an "absolutist conception of 'make whole'" relief. *Post,* at 791.

[38] In arguing that an award of the seniority relief established as presumptively necessary does nothing to place the burden of the past discrimination on the wrongdoer in most cases—the employer—the dissent of necessity addresses issues not presently before the Court. Further remedial action by the district courts, having the effect of shifting to the employer the burden of the past discrimination in respect of competitive-status benefits, raises such issues as the possibility of an injunctive "hold harmless" remedy respecting all affected employees in a layoff situation, Brief for Local 862, United Automobile Workers, as *Amicus Curiae,* the possibility of an award of monetary damages (sometimes designated "front pay") in favor of each employee and discriminatee otherwise bearing some of the burden of the past discrimination, *ibid.;* and the propriety of such further remedial action in instances wherein the union has been adjudged a participant in the illegal conduct. Brief for United States et al. as *Amici Curiae.* Such issues are not presented by the record before us, and we intimate no view regarding them.

[39] " 'The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private

larly when considered in light of our traditional view that "[a]ttainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies." *Phelps Dodge Corp.* v. *NLRB*, 313 U. S., at 188.

Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest.[40] *Tilton* v. *Missouri Pacific R. Co.*, 376 U. S. 169 (1964) (construing §§ 9 (c)(1) and 9 (c)(2) of the Universal Military Training and Service Act, 1948, 50 U. S. C. App. §§ 459 (c)(1) and (2), which provided that a re-employed returning veteran should enjoy the seniority status he would have acquired but for his absence in military service); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (1946) (construing the comparable provision of the Selective Training and Service Act of 1940). The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to

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claims.'" "'Moreover, . . . equitable remedies are a special blend of what is necessary, what is fair, and what is workable . . . .

"'In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests. . . .'" *Post*, at 789–790.

[40] "[C]laims under Title VII involve the vindication of a major public interest . . . ." Section-By-Section Analysis of H. R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972).

the expectations acquired by other employees under the previous seniority agreement. *Ford Motor Co.* v. *Huffman,* 345 U. S. 330 (1953). And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority," is certainly no less than in other areas of public policy interests. *Pellicer* v. *Brotherhood of Ry. & S. S. Clerks,* 217 F. 2d 205 (CA5 1954), cert. denied, 349 U. S. 912 (1955). See also Cooper & Sobol, 82 Harv. L. Rev., at 1605.

V

In holding that class-based seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate under § 706 (g), we do not in any way modify our previously expressed view that the statutory scheme of Title VII "implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts." *Albemarle Paper,* 422 U. S., at 416. Circumstances peculiar to the individual case may, of course, justify the modification or withholding of seniority relief for reasons that would not if applied generally undermine the purposes of Title VII.[41] In the

[41] Accordingly, to no "significant extent" do we "[strip] the district courts of [their] equity powers." *Post,* at 786. Rather our holding is that in exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases. To hold otherwise would be to shield "inconsisten[t] and capri[cious]" denial of such relief from "thorough appellate review." *Albemarle Paper,* 422 U. S., at 421, 416.

instant case it appears that all new hirees establish seniority only upon completion of a 45-day probationary period, although upon completion seniority is retroactive to the date of hire. Certainly any seniority relief ultimately awarded by the District Court could properly be cognizant of this fact. *Amici* and the respondent union point out that there may be circumstances where an award of full seniority should be deferred until completion of a training or apprenticeship program, or other preliminaries required of all new hirees.[42] We do not undertake to delineate all such possible circumstances here. Any enumeration must await particular cases and be determined in light of the trial courts' "keener appreciation" of peculiar facts and circumstances. *Albemarle Paper, supra,* at 421–422.

Accordingly, the judgment of the Court of Appeals affirming the District Court's denial of seniority relief to class 3 is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I agree generally with MR. JUSTICE POWELL, but I would stress that although retroactive benefit-type seniority relief may sometimes be appropriate and equitable, competitive-type seniority relief at the expense of wholly

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[42] Brief for United States et al. as *Amici Curiae* 26; Brief for Respondent United Steelworkers of America, AFL–CIO, and for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 28 n. 32.

innocent employees can rarely, if ever, be equitable if that term retains traditional meaning. More equitable would be a monetary award to the person suffering the discrimination. An award such as "front pay" could replace the need for competitive-type seniority relief. See, *ante*, at 777 n. 38. Such monetary relief would serve the dual purpose of deterring wrongdoing by the employer or union—or both—as well as protecting the rights of innocent employees. In every respect an innocent employee is comparable to a "holder-in-due-course" of negotiable paper or a bona fide purchaser of property without notice of any defect in the seller's title. In this setting I cannot join in judicial approval of "robbing Peter to pay Paul."

I would stress that the Court today does not foreclose claims of employees who might be injured by this holding from securing equitable relief on their own behalf.

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in part and dissenting in part.

I agree that this controversy is not moot, and that in the context of a duly certified class action the "capable of repetition, yet evading review" criterion discussed last Term in *Sosna* v. *Iowa*, 419 U. S. 393 (1975), is only a factor in our discretionary decision whether to reach the merits of an issue, rather than an Art. III "case or controversy" requirement. I therefore concur in Part I of the Court's opinion.

I also agree with Part II of the opinion insofar as it determines the "thrust" of § 703 (h) of Title VII to be the insulation of an otherwise bona fide seniority system from a challenge that it amounts to a discriminatory practice because it perpetuates the effects of pre-Act discrimination. *Ante*, at 761. Therefore, I concur in the precise holding of Part II, which is that the Court of Appeals erred in interpreting § 703 (h) as a bar, in

every instance, to the award of retroactive seniority relief to persons discriminatorily refused employment after the effective date of Title VII. *Ante*, at 762.

Although I am in accord with much of the Court's discussion in Parts III and IV, I cannot accept as correct its basic interpretation of § 706 (g) as virtually requiring a district court, in determining appropriate equitable relief in a case of this kind, to ignore entirely the equities that may exist in favor of innocent employees. Its holding recognizes no meaningful distinction, in terms of the equitable relief to be granted, between "benefit"-type seniority and "competitive"-type seniority.[1] The Court reaches this result by taking an absolutist view of the "make whole" objective of Title VII, while rendering largely meaningless the discretionary authority vested in district courts by § 706 (g) to weigh the equities of the situation. Accordingly, I dissent from Parts III and IV.

I

My starting point, as it is for the Court, is the decision last Term in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975). One of the issues there was the standards a federal district court should follow in determining whether victims of a discriminatory employment practice should be awarded backpay. The Court began with

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[1] My terminology conforms to that of the Court, *ante*, at 766. "Benefit"-type seniority refers to the use of a worker's earned seniority credits in computing his level of economic "fringe benefits." Examples of such benefits are pensions, paid vacation time, and unemployment insurance. "Competitive"-type seniority refers to the use of those same earned credits in determining his right, relative to other workers, to job-related "rights" that cannot be supplied equally to any two employees. Examples can range from the worker's right to keep his job while someone else is laid off, to his right to a place in the punch-out line ahead of another employee at the end of a workday.

an observation about the nature of backpay awards and other relief under § 706 (g), the basic remedial section of Title VII:

> "It is true that backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke. The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts." 422 U. S., at 415–416.

Backpay is the only remedy accompanying reinstatement that is mentioned specifically in Title VII. Moreover, as noted below, backpay is a remedy central to achieving the purposes of the Act. The Court in *Albemarle*, recognizing that equitable discretion under § 706 (g) should not be left "unfettered by meaningful standards or shielded from thorough appellate review," 422 U. S., at 416, required of district courts the "principled application of standards [in determining backpay awards] consistent with [congressional] purposes," *id.*, at 417. It identified two distinct congressional purposes implicit in Title VII. The "primary objective" was "prophylactic": " 'to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.' " *Ibid.*, quoting *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971). The second purpose was "to make persons whole for injuries suffered on account of unlawful employment discrimination." 422 U. S., at 418. Because backpay served both objectives,[2]

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[2] As to the prophylactic purpose, the Court stated:

"It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions

the Court concluded that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.*, at 421.

The Court today, relying upon *Albemarle*'s holding as to the "make whole" purpose of Title VII, reasons that adequate relief for a victim of discrimination ordinarily will require "slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application." *Ante*, at 765–766. Accordingly, the Court concludes that complete retroactive seniority should be treated like backpay and denied by a district court only for reasons which, applied generally, could not "frustrate" the congressional intent. *Ante*, at 771. Although the Court recognizes important differences between benefit-type seniority and competitive-type seniority, it expressly includes both in its conclusion that seniority relief presumptively should be available.[3] For the reasons that follow, I think the

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to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" 422 U. S., at 417–418 (citations omitted).

Backpay furthers the "make whole" purpose of the statute by replacing some of the economic loss suffered as a result of the employer's wrongdoing. See *id.*, at 418–420.

[3] "Discretion is vested . . . to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case. . . . Accordingly, the District Court's denial of *any form* of seniority remedy must be reviewed in terms of its effect on the attainment of the Act's objectives under the circumstances presented by this record." *Ante*, at 770–771 (emphasis added).

Court's holding cannot be reconciled with § 706 (g) or with fundamental fairness.

II

When a district court orders an award of backpay or retroactive seniority, it exercises equity powers expressly conferred upon it by Congress. . The operative language of § 706 (g) states that upon a finding of an unlawful employment practice the district court may enjoin the practice and, further, may

> "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate." 42 U. S. C. 2000e–5 (g) (1970 ed., Supp. IV).

The last phrase speaking to "other equitable relief" was added by a 1972 amendment, Pub. L. No. 92–261, 86 Stat. 103. As noted in *Albemarle, supra,* at 420–421, and again by the Court today, *ante,* at 764, a Section-by-Section Analysis accompanying the Conference Report on that amendment stated that it was Congress' intention in § 706 (g) "to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible." 118 Cong. Rec. 7168 (1972).

The expansive language of § 706 (g) and the 1972 legislative history support a general directive to district courts to grant "make whole" relief liberally and not refuse it arbitrarily. There is nothing in either of those sources, however, to suggest that rectifying economic losses from past wrongs requires the district courts to disregard normal equitable considerations. Indeed, such

a requirement is belied by the language of the statute itself, which speaks of "such affirmative action as may be appropriate" and such "equitable relief as the court deems appropriate." The Section-by-Section Analysis similarly recognized that in fashioning "the most complete relief possible" the court still is to exercise "equitable powers." But in holding that a district court in the usual case should order full retroactive seniority as a remedy for a discriminatory refusal to hire without regard to the effect upon innocent employees hired in the interim, the Court to a significant extent strips the district courts of the equity powers vested in them by Congress.

III

A

In *Albemarle Paper* the Court read Title VII as creating a presumption in favor of backpay. Rather than limiting the power of district courts to do equity, the presumption insures that complete equity normally will be accomplished. Backpay forces the employer[4] to account for economic benefits that he wrongfully has denied the victim of discrimination. The statutory purposes and equitable principles converge, for requiring payment of wrongfully withheld wages deters further wrongdoing at the same time that their restitution to the victim helps make him whole.

Similarly, to the extent that the Court today finds a like presumption in favor of granting *benefit*-type seniority, it is recognizing that normally this relief also will be equitable. As the Court notes, *ante*, at 773 n. 33, this type of seniority, which determines pension rights, length of vacations, size of insurance coverage and unemploy-

[4] In an appropriate case, of course, Title VII remedies may be ordered against a wrongdoing union as well as the employer.

ment benefits, and the like, is analogous to backpay in that its retroactive grant serves "the mutually reinforcing effect of the dual purposes of Title VII," *ante,* at 767 n. 27. Benefit-type seniority, like backpay, serves to work complete equity bv penalizing the wrongdoer economically at the same time that it tends to make whole the one who was wronged.

But the Court fails to recognize that a retroactive grant of *competitive*-type seniority invokes wholly different considerations. This is the type of seniority that determines an employee's preferential rights to various economic advantages at the expense of other employees. These normally include the order of layoff and recall of employees, job and trip assignments, and consideration for promotion.

It is true, of course, that the retroactive grant of competitive-type seniority does go a step further in "making whole" the discrimination victim, and therefore arguably furthers one of the objectives of Title VII. But apart from extending the make-whole concept to its outer limits, there is no similarity between this drastic relief and the granting of backpay and benefit-type seniority. First, a retroactive grant of competitive-type seniority usually does not directly affect the employer at all. It causes only a rearrangement of employees along the seniority ladder without any resulting increase in cost.[5]

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[5] This certainly would be true in this case, as conceded by counsel for Bowman at oral argument. There the following exchange took place:

"QUESTION: How is Bowman injured by this action?

"MR. PATE [Counsel for Bowman]: By seniority? By the grant of this remedy?

"QUESTION: Either way.

"MR. PATE: It is not injured either way and the company, apart from the general interest of all of us in the importance of the question, has no specific tangible interest in it in this case as

Thus, Title VII's "primary objective" of eradicating discrimination is not served at all,[6] for the employer is not deterred from the practice.

The second, and in my view controlling, distinction between these types of relief is the impact on other workers. As noted above, the granting of backpay and of benefit-type seniority furthers the prophylactic and make-whole objectives of the statute without penalizing other workers. But competitive seniority benefits, as the term implies, directly implicate the rights and expectations of perfectly innocent employees.[7] The eco-

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to whether seniority is granted to this group or not. That is correct." Tr. of Oral Arg. 42.

In a supplemental memorandum filed after oral argument, petitioners referred to this statement by Bowman's counsel and suggested that he apparently was referring to the competitive aspects of seniority, such as which employees were to get the best job assignments, since Bowman certainly *would* be economically disadvantaged by the benefit-type seniority, such as seniority-related increases in backpay. I agree that in the context Bowman's counsel spoke, he was referring to the company's lack of a tangible interest in whether or not competitive-type seniority was granted.

[6] The Court in *Albemarle* noted that this primary objective had been recognized in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). See 422 U. S., at 417; see also *supra*, at 783. In *Griggs*, the Court found this objective to be "plain from the language of the statute." 401 U. S., at 429. In creating a presumption in favor of a retroactive grant of competitive-type seniority the Court thus exalts the make-whole purpose, not only above fundamental principles of equity, but also above the primary objective of the statute recently found to be plain on its face.

[7] Some commentators have suggested that the expectations of incumbents somehow may be illegitimate because they result from past discrimination against others. Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1605–1606 (1969). Such reasoning is badly flawed. Absent some showing of collusion, the incumbent employee was not a party to the discrimination by the employer. Acceptance of the job

nomic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers. Putting it differently, those disadvantaged—sometimes to the extent of losing their jobs entirely—are not the wrongdoers who have no claim to the Chancellor's conscience, but rather are innocent third parties.

As noted above in Part II, Congress in § 706 (g) expressly referred to "appropriate" affirmative action and "other equitable relief as the court deems appropriate." And the 1972 Section-by-Section Analysis still recognized that the touchstone of any relief is equity. Congress could not have been more explicit in leaving the relief to the equitable discretion of the court, to be determined in light of all relevant facts and circumstances. Congress did underscore "backpay" by specific reference in § 706 (g), but no mention is made of the granting of other benefits upon ordering reinstatement or hiring. The entire question of retroactive seniority was thus deliberately left to the discretion of the district court, a discretion to be exercised in accordance with equitable principles.

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329–330 (1944).

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when offered hardly makes one an accessory to a discriminatory failure to hire someone else. Moreover, the incumbent's expectancy does not result from discrimination against others, but is based on his own efforts and satisfactory performance.

> "Moreover, . . . equitable remedies are a special blend of what is necessary, what is fair, and what is workable. . . ." *Lemon* v. *Kurtzman*, 411 U. S. 192, 200 (1973) (opinion of BURGER, C. J.).
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> "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests . . . ." *Id.*, at 201.

The decision whether to grant competitive-type seniority relief therefore requires a district court to consider and weigh competing equities. In any proper exercise of the balancing process, a court must consider both the claims of the discrimination victims and the claims of incumbent employees who, if competitive seniority rights are awarded retroactively to others, will lose economic advantages earned through satisfactory and often long service.[8] If, as the Court today holds, the district court may not weigh these equities much of the language of § 706 (g) is rendered meaningless. We cannot assume that Congress intended either that the statutory lan-

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[8] The Court argues that a retroactive grant of competitive-type seniority always is equitable because it "divides the burden" of past discrimination between incumbents and victims. *Ante*, at 776–777. Aside from its opacity, this argument is flawed by what seems to be a misperception of the nature of Title VII relief. Specific relief necessarily focuses upon the individual victim, not upon some "class" of victims. A grant of full retroactive seniority to an individual victim of Bowman's discriminatory hiring practices will place that person exactly where he would have been had he been hired when he first applied. The question for a district court should be whether it is equitable to place that individual in that position despite the impact upon all incumbents hired after the date of his unsuccessful application. Any additional effect upon the entire work force—incumbents and the newly enfranchised victims alike—of similar relief to still *earlier* victims of the discrimination, raises distinctly different issues from the equity, vis-à-vis incumbents, of granting retroactive seniority to each victim.

guage be ignored or that the earned benefits of incumbent employees be wiped out by a presumption created by this Court.[9]

B

The Court's concern to effectuate an absolutist conception of "make whole" should be tempered by a recognition that a retroactive grant of competitive-type seniority touches upon other congressional concerns expressed in Title VII. Two sections of the Act, although not speaking directly to the issue, indicate that this remedy, unlike backpay and benefit-type seniority, should not be granted automatically.

The first section, § 703 (h), has been discussed in the Court's opinion. As there noted, the "thrust" of that section is the validation of seniority plans in existence on the effective date of Title VII. The congressional debates leading to the introduction of § 703 (h) indicate a concern that Title VII not be construed as requiring immediate and total restitution to the victims of discrimination regardless of cost in terms of other workers' legitimate expectations. Section 703 (h) does not restrict the remedial powers of a district court once a dis-

[9] Indeed, the 1972 amendment process which produced the Section-by-Section Analysis containing the statement of the Act's "make whole" purpose, also resulted in an addition to § 706 (g) itself clearly showing congressional recognition that total restitution to victims of discrimination is not a feasible goal. As originally enacted, § 706 (g) contained simply an authorization to district courts to order reinstatement with or without backpay, with no limitation on how much backpay the courts could order. In 1972, however, the Congress added a limitation restricting the courts to an award to a date two years prior to the filing of a charge with EEOC. While it is true that Congress at the same time rejected an even more restrictive limitation, see *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 420 n. 13, its adoption of any limitation at all suggests an awareness that the desire to "make whole" must yield at some point to other considerations.

criminatory practice has been found, but neither are the concerns expressed therein irrelevant to a court's determination of "appropriate" equitable relief under § 706 (g). Although the Court of Appeals read far too much into § 703 (h), it properly recognized that the section does reflect congressional concern for existing rights under a "bona fide seniority or merit system."

Also relevant is § 703 (j), which prohibits any interpretation of Title VII that would require an employer to grant "preferential treatment" to any individual because his race is underrepresented in the employer's work force in comparison with the community or the available work force.[10] A grant of competitive seniority to an identifiable victim of discrimination is not the kind of preferential treatment forbidden by § 703 (j) but, as counsel for the Steelworkers admitted at oral argument, it certainly would be "preferential treatment." [11] It constitutes a preference in the sense that the victim of

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[10] Section 703 (j), 78 Stat. 257, 42 U. S. C. § 2000e–2 (j), reads in full as follows:

"(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

[11] Tr. of Oral Arg. 33.

discrimination henceforth will outrank, in the seniority system, the incumbents hired after the discrimination. Moreover, this is a preference based on a fiction, for the discrimination victim is placed ahead of others not because of time actually spent on the job but "as if" he had worked since he was denied employment. This also requires an assumption that nothing would have interrupted his employment, and that his performance would have justified a progression up the seniority ladder.[12] The incumbents, who in fact were on the job during the interim and performing satisfactorily, would be seriously disadvantaged. The congressional bar to one type of preferential treatment in § 703 (j) should at least give the Court pause before it imposes upon district courts a duty to grant relief that creates another type of preference.

IV

In expressing the foregoing views, I suggest neither that Congress intended to bar a retroactive grant of competitive-type seniority in all cases,[13] nor that district

[12] It is true, of course, that backpay awards and retroactive grants of benefit-type seniority likewise are based on the same fiction and the same assumption. In the case of those remedies, however, no innocent persons are harmed by the use of the fiction, and any uncertainty about whether the victim of discrimination in fact would have retained the job and earned the benefits is properly borne by the wrongdoer.

[13] Nor is it suggested that incumbents have "indefeasibly vested rights" to their seniority status that invariably would foreclose retroactive seniority. But the cases cited by the Court for that proposition do not hold, or by analogy imply, that district courts operating under § 706 (g) lack equitable discretion to take into account the rights of incumbents. In *Tilton* v. *Missouri Pacific R. Co.*, 376 U. S. 169 (1964), and *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275 (1946), the Court only confirmed an express congressional determination, presumably made after weighing all relevant considerations, that for reasons of public policy veterans should receive

courts should indulge a presumption against such relief.[14] My point instead is that we are dealing with a congressional mandate to district courts to determine and apply equitable remedies. Traditionally this is a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court. At this time it is necessary only to avoid imposing, from the level of this Court, arbitrary limitations on the exercise of this traditional discretion specifically explicated in § 706 (g). There will be cases where, under all of the circumstances, the economic penalties that would be imposed on innocent incumbent employees will outweigh the claims of discrimination victims to be made entirely whole even at the expense of others. Similarly, there will be cases where the balance properly is struck the other way.

The Court virtually ignores the only previous judicial discussion directly in point. The Court of Appeals for the Sixth Circuit, recently faced with the issue of retro-

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seniority credit for their time in military service. See 376 U. S., at 174–175. In *Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (1953), the Court affirmed the authority of a collective-bargaining agent, presumably after weighing the relative equities, see *id.*, at 337–339, to advantage certain employees more than others. All I contend is that under § 706 (g) a district court, like Congress in *Tilton* and *Fishgold*, and the bargaining agent in *Huffman*, also must be free to weigh the equities.

[14] The Court, *ante*, at 764 n. 21, suggests I am arguing that retroactive competitive-type seniority should be "less available" as relief than backpay. This is not my position. All relief not specifically prohibited by the Act is equally "available" to the district courts. My point is that equitable considerations can make competitive-type seniority relief less "appropriate" in a particular situation than backpay or other relief. Again, the plain language of § 706 (g) compels careful determination of the "appropriateness" of each "available" remedy in a specific case, and does not permit the inflexible approach taken by the Court.

active seniority for victims of hiring discrimination, showed a fine appreciation of the distinction discussed above. *Meadows* v. *Ford Motor Co.*, 510 F. 2d 939 (1975), cert. pending, No. 74–1349.[15] That court began with the recognition that retroactive competitive-type seniority presents "greater problems" than a grant of backpay because the burden falls upon innocent incumbents rather than the wrongdoing employer. *Id.*, at 949.[16] The court further recognized that Title VII contains no prohibition against such relief. Then, noting that "the remedy for the wrong of discriminatory refusal to hire lies in the first instance *with the District Judge*," *ibid.* (emphasis added), the Court of Appeals for the Sixth Circuit stated:

> "For his guidance on this issue we observe . . . that a grant of retroactive seniority would not depend solely upon the existence of a record sufficient to justify back pay . . . . The court would, in dealing with job [*i. e.*, competitive-type] seniority, need also to consider the interests of the workers who might be displaced . . . . We do not assume . . . that such reconciliation is impossible, but as is obvious, we certainly do foresee genuine difficulties. . . ." *Ibid.*

The Sixth Circuit suggested that the District Court seek

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[15] From the briefs of the parties it appears that *Meadows* is one of only three reported appellate decisions dealing with the question of retroactive seniority relief to victims of discriminatory hiring practices. In the instant case, of course, the Court of Appeals for the Fifth Circuit held such relief barred by § 703 (h). In *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F. 2d 1038, vacated and remanded on other grounds, 414 U. S. 970 (1973), the Court of Appeals for the Third Circuit ordered the relief without any discussion of equitable considerations.

[16] The Sixth Circuit noted that no equitable considerations stand in the way of a district court's granting retroactive benefit-type seniority. 510 F. 2d, at 949.

enlightenment on the questions involved in the particular fact situation, and that it should allow intervention by representatives of the incumbents who stood to be disadvantaged.[17]

In attempted justification of its disregard of the explicit equitable mandate of § 706 (g) the Court today relies almost exclusively on the practice of the National Labor Relations Board under § 10 (c) of the National Labor Relations Act, 29 U. S. C. § 160 (c).[18] It is true

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[17] One of the commentators quoted by the Court today has endorsed the evenhanded approach adopted by the Sixth Circuit: "In fashioning a remedy, . . . the courts should consciously assess the costs of relief to *all* the parties in the case, and then tailor the decree to minimize these costs while affording plaintiffs adequate relief. The best way to do this will no doubt vary from case to case depending on the facts: the number of plaintiffs, the number of [incumbents] affected and the alternatives available to them, the economic circumstances of the industry." Poplin, Fair Employment in a Depressed Economy: The Layoff Problem, 23 U. C. L. A. L. Rev. 177, 202 (1975) (emphasis in original); see *id.*, at 224.

Another commentator has said that judges who fail to take account of equitable claims of incumbents are engaging in an "Alice in Wonderland" approach to the problem of Title VII remedies. See Rains, Title VII v. Seniority Based Layoffs: A Question of Who Goes First, 4 Hofstra L. Rev. 49, 53 (1975).

[18] By gathering bits and pieces of the legislative history of the 1972 amendments, the Court attempts to patch together an argument that full retroactive seniority is a remedy equally "available" as backpay. *Ante*, at 764–765, n. 21. There are two short responses. First, as emphasized elsewhere, *supra*, at 794 n. 14, no one contends that such relief is less *available*, but only that it may be less *equitable* in some situations. Second, insofar as the Court intends the legislative history to suggest some presumption in favor of this relief, it is irrefutably blocked by the plain language of § 706 (g) calling for the exercise of *equitable* discretion in the fashioning of *appropriate* relief. There are other responses. As to the committee citations of lower court decisions and the Conference Report Analysis reference to "present case law," it need only be noted that as of the 1972 amendments no appellate court had considered a

that in the two instances cited by the Court, and in the few others cited in the briefs of the parties,[19] the Board has ordered reinstatement of victims of discrimination "without prejudice to their seniority or other rights and privileges." But the alleged precedents are doubly unconvincing. First, in none of the cases is there a discussion of equities either by the Board or the enforcing court. That the Board has granted seniority relief in several cases may indicate nothing more than the fact that in the usual case no one speaks for the individual incumbents. This is the point recognized by the court in *Meadows,* and the impetus for its suggestion that a representative of their interests be entertained by the district court before it determines "appropriate" § 706 (g) relief.

I also suggest, with all respect, that the Court's appeal to Board practice wholly misconceives the lesson to be

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case involving retroactive seniority relief to victims of discriminatory hiring practices. Moreover, the cases were cited only in the context of a general discussion of the complexities of employment discrimination, never for their adoption of a "rightful place" theory of relief. And by the terms of the Conference Report Analysis itself, the existing case law could not take precedence over the explicit language of § 706 (g), added by the amendments, that told courts to exercise *equitable* discretion in granting *appropriate* relief.

Moreover, I find no basis for the Court's statement that the Committee Reports indicated "rightful place" to be the objective of Title VII relief. In fact, in both instances cited by the Court the term was used in the context of a general comment that minorities were still "far from reaching their rightful place in society." S. Rep. No. 92–416, p. 6 (1971). There was no reference to the scope of relief under § 706 (g), or indeed even to Title VII remedies at all.

[19] The respondent Steelworkers cited seven Board decisions in addition to those mentioned in the Court's opinion. Brief for Respondent United Steelworkers of America, AFL–CIO, and for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae,* 27 n. 31.

drawn from it. In the seminal case recognizing the Board's power to order reinstatement for discriminatory refusals to hire, this Court in a reasoned opinion by Mr. Justice Frankfurter was careful to emphasize that the decision on the type and extent of relief rested in the Board's discretion, subject to limited review only by the courts.

> "But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. . . .
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> . . . . . .
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> ". . . All these and other factors outside our domain of experience may come into play. Their relevance is for the Board, not for us. *In the exercise of its informed discretion the Board may find that effectuation of the Act's policies may or may not require reinstatement.* We have no warrant for speculating on matters of fact the determination of which Congress has entrusted to the Board. All we are entitled to ask is that the statute speak through the Board where the statute does not speak for itself." *Phelps Dodge Corp.* v. *NLRB,* 313 U. S. 177, 194–196 (1941) (emphasis added).

The fallacy of the Court's reliance upon Board practice is apparent: the district courts under Title VII stand in the place of the Board under the NLRA. Congress entrusted to their discretion the appropriate remedies for violations of the Act, just as it previously had entrusted discretion to the Board. The Court today denies that

discretion to the district courts, when 35 years ago it was quite careful to leave discretion where Congress had entrusted it. It may be that the district courts, after weighing the competing equities, would order full retroactive seniority in most cases. But they should do so only after determining in each instance that it *is* appropriate, and not because this Court has taken from them the power—granted by Congress—to weigh the equities.

In summary, the decision today denying district courts the power to balance equities cannot be reconciled with the explicit mandate of § 706 (g) to determine "appropriate" relief through the exercise of "equitable powers." Accordingly, I would remand this case to the District Court with instructions to investigate and weigh competing equities before deciding upon the appropriateness of retroactive competitive-type seniority with respect to individual claimants.[20]

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[20] This is not to suggest that district courts should be left to exercise a standardless, unreviewable discretion. But in the area of competitive-type seniority, unlike backpay and benefit-type seniority, the twin purposes of Title VII do not provide the standards. District courts must be guided in each instance by the mandate of § 706 (g). They should, of course, record the considerations upon which they rely in granting or refusing relief, so that appellate review could be informed and precedents established in the area.

In this case, for example, factors that could be considered on remand and that could weigh in favor of full retroactive seniority, include Bowman's high employee turnover rate and the asserted fact that few victims of Bowman's discrimination have indicated a desire to be hired. Other factors, not fully developed in the record, also could require consideration in determining the balance of the equities. I would imply no opinion on the merits and would remand for full consideration in light of the views herein expressed.

COLORADO RIVER WATER CONSERVATION DISTRICT ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 74–940. Argued January 14, 1976—Decided March 24, 1976*

In order to manage the allocation of water and to resolve conflicting claims thereto, Colorado enacted legislation under which the State is divided into seven Water Divisions, in each of which a procedure is established for the settlement of water claims on a continuous basis. A State Engineer is charged with responsibility for administering the distribution of state waters. Seeking adjudication of reserved rights claimed on behalf of itself and certain Indian tribes, as well as rights based on state law, in waters in certain rivers in Division 7, the United States, which had previously asserted non-Indian reserved water rights in three other State Water Divisions, brought this suit against some 1,000 water users in the District Court. The Government invoked District Court jurisdiction under 28 U. S. C. § 1345. Shortly thereafter, one of the federal-suit defendants sought in the state court for Division 7 to make the Government a party to proceedings in that Division for the purpose of there adjudicating all the Government's claims, both state and federal, pursuant to the McCarran Amendment, 43 U. S. C. § 666. That law provides for consent to join the United States in any suit (1) for the adjudication of water rights, or (2) the administration of such rights, where it appears that the United States owns or is acquiring such rights by appropriation under state law or otherwise. The District Court, on abstention grounds, granted a motion to dismiss the Government's suit. The Court of Appeals reversed, holding that jurisdiction for that suit existed under 28 U. S. C. § 1345, and that abstention was inappropriate. *Held:*

1. The McCarran Amendment, as is clear from its language and legislative history, did not divest the District Court of jurisdiction over this litigation under § 1345. The effect of the Amendment is to give consent to state jurisdiction concurrent with federal jurisdiction over controversies involving federal water rights. Pp. 806–809.

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*Together with No. 74–949, *Akin et al.* v. *United States*, also on certiorari to the same court.

2. That Amendment includes consent to determine in state court reserved water rights held on behalf of Indians, see *United States* v. *District Court for Eagle County*, 401 U. S. 520, and *United States* v. *District Court for Water Div. 5*, 401 U. S. 527, and the exercise of state jurisdiction does not imperil those rights or breach the Government's special obligation to protect the Indians. Pp. 809–813.

3. The abstention doctrine is confined to three categories of cases, none of which applies to the litigation at bar; hence the District Court's dismissal on the basis of abstention was inappropriate. Pp. 813–817.

4. Several factors, however, are present in this litigation that counsel against exercise of concurrent federal jurisdiction, clearly supporting dismissal of the Government's action and resolution of its water-right claims in the state-court proceedings. Pp. 817–820.

(a) Most significantly, such dismissal furthers the policy of the McCarran Amendment recognizing the desirability of unified adjudication of water rights and the availability of state systems like the one in Colorado for such adjudication and management of rights to use the State's waters. The Colorado legislation established a continuous proceeding for adjudicating water rights that antedated the Government's suit and reached "all claims, perhaps month by month but inclusively in the totality," *United States* v. *District Court for Water Div. 5*, *supra*, at 529. Pp. 819–820.

(b) Other significant factors include (1) the apparent absence before dismissal of any District Court proceedings other than the filing of the complaint; (2) the extensive involvement of state water rights occasioned by this suit against 1,000 defendants; (3) the distance between the federal court and Division 7; and (4) the Government's existing participation in proceedings in three other Divisions. P. 820.

504 F. 2d 115, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 821. STEVENS, J., filed a dissenting opinion, *post*, p. 826.

Kenneth Balcomb argued the cause for petitioners in both cases. With him on the briefs were *J. D. MacFar-*

lane, Attorney General of Colorado, *Jean E. Dubofsky*, Deputy Attorney General, *Edward G. Donovan*, Solicitor General, *David W. Robbins*, First Assistant Attorney General, *Charles M. Elliott*, Special Assistant Attorney General, *Scott Balcomb*, *Robert L. McCarty*, *George L. Zoellner*, *Kenneth L. Broadhurst*, *Glenn G. Saunders*, *Charles J. Beise*, and *D. Monte Pascoe*.

Howard E. Shapiro argued the cause for the United States in both cases. With him on the brief were *Solicitor General Bork*, *Acting Assistant Attorney General Kiechel*, *Deputy Solicitor General Randolph*, *Edmund B. Clark*, and *Lawrence E. Shearer*.†

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The McCarran Amendment, 66 Stat. 560, 43 U. S. C. § 666, provides that "consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such

†A brief of *amici curiae* urging reversal in both cases was filed for their respective States by *Bruce Babbitt*, Attorney General of Arizona, *Evelle J. Younger*, Attorney General of California, *Wayne L. Kidwell*, Attorney General of Idaho, *Curt T. Schneider*, Attorney General of Kansas, *Robert L. Woodahl*, Attorney General of Montana, *Paul L. Douglas*, Attorney General of Nebraska, *Robert List*, Attorney General of Nevada, *Antonio Anaya*, Attorney General of New Mexico, *Allen I. Olson*, Attorney General of North Dakota, *Larry Derryberry*, Attorney General of Oklahoma, *R. Lee Johnson*, Attorney General of Oregon, *William J. Janklow*, Attorney General of South Dakota, *John L. Hill*, Attorney General of Texas, *Vernon B. Romney*, Attorney General of Utah, *Slade Gorton*, Attorney General of Washington, and *V. Frank Mendicino*, Attorney General of Wyoming.

Briefs of *amici curiae* urging affirmance in both cases were filed by *Richard A. Baenen*, *Marvin J. Sonosky*, and *R. Anthony Rogers* for the National Congress of American Indians, Inc., et al.; and by *Robert S. Pelcyger* for the Southern Ute Indian Tribe et al.

rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." The questions presented by this case concern the effect of the McCarran Amendment upon the jurisdiction of the federal district courts under 28 U. S. C. § 1345 over suits for determination of water rights brought by the United States as trustee for certain Indian tribes and as owner of various non-Indian Government claims.[1]

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[1] The McCarran Amendment (also known as the McCarran Water Rights Suit Act), 43 U. S. C. § 666, as codified, provides in full text:

"(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

"(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

"(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream."

See also *infra,* at 807.

Title 28 U. S. C. § 1345 provides:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or

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It is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water. As southwestern populations have grown, conflicting claims to this scarce resource have increased. To meet these claims, several Southwestern States have established elaborate procedures for allocation of water and adjudication of conflicting claims to that resource.[2] In 1969, Colorado enacted its Water Rights Determination and Administration Act [3] in an effort to revamp its legal procedures for determining claims to water within the State.

Under the Colorado Act, the State is divided into seven Water Divisions, each Division encompassing one or more entire drainage basins for the larger rivers in Colorado.[4] Adjudication of water claims within each Division occurs on a continuous basis.[5] Each month, Water Referees in each Division rule on applications for water rights filed within the preceding five months or refer those applications to the Water Judge of their Division.[6] Every six months, the Water Judge passes on referred applications and contested decisions by Referees.[7] A State Engineer and engineers for each Division are responsible for the administration and dis-

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proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

[2] See, *e. g.*, Ariz. Rev. Stat. Ann. §§ 45–102 to 45–106, 45–141 to 45–154, 45–180 to 45–193, 45–231 to 45–245 (1956 and Supp. 1975); Cal. Water Code §§ 174–192, 1000–5108 (1971 and Supp. 1976); Nev. Rev. Stat. § 533.010 *et seq.* (1973); N. M. Stat. Ann. §§ 75–1–1 to 75–6–3 (1968 and Supp. 1975).

[3] Colo. Rev. Stat. Ann. § 37–92–101 *et seq.* (1974).

[4] § 37–92–201.

[5] See §§ 37–92–302 to 37–92–303.

[6] § 37–92–303.

[7] § 37–92–304.

tribution of the waters of the State according to the determinations in each Division.[8]

Colorado applies the doctrine of prior appropriation in establishing rights to the use of water.[9] Under that doctrine, one acquires a right to water by diverting it from its natural source and applying it to some beneficial use. Continued beneficial use of the water is required in order to maintain the right. In periods of shortage, priority among confirmed rights is determined according to the date of initial diversion.[10]

The reserved rights of the United States extend to Indian reservations, *Winters* v. *United States,* 207 U. S. 564 (1908), and other federal lands, such as national parks and forests, *Arizona* v. *California,* 373 U. S. 546 (1963). The reserved rights claimed by the United States in this case affect waters within Colorado Water Division No. 7. On November 14, 1972, the Government instituted this suit in the United States District Court for the District of Colorado, invoking the court's jurisdiction under 28 U. S. C. § 1345. The District Court is located in Denver, some 300 miles from Division 7. The suit, against some 1,000 water users, sought declaration of the Government's rights to waters in certain rivers and their tributaries located in Division 7. In the suit, the Government asserted reserved rights on its own behalf and on behalf of certain Indian tribes, as well as rights based on state law. It sought appointment of a water master to administer any waters decreed to the United States.

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[8] § 37–92–301.

[9] Colo. Const. Art. XVI, §§ 5, 6; Colo. Rev. Stat. Ann. §§ 37–92–102 to 37–92–306 (1974); *Coffin* v. *Left Hand Ditch Co.,* 6 Colo. 443 (1882).

[10] See *City of Colorado Springs* v. *Bender,* 148 Colo. 458, 366 P. 2d 552 (1961); *City of Colorado Springs* v. *Yust,* 126 Colo. 289; 249 P. 2d 151 (1952).

Prior to institution of this suit, the Government had pursued adjudication of non-Indian reserved rights and other water claims based on state law in Water Divisions 4, 5, and 6, and the Government continues to participate fully in those Divisions.

Shortly after the federal suit was commenced, one of the defendants in that suit filed an application in the state court for Division 7, seeking an order directing service of process on the United States in order to make it a party to proceedings in Division 7 for the purpose of adjudicating all of the Government's claims, both state and federal. On January 3, 1973, the United States was served pursuant to authority of the McCarran Amendment. Several defendants and intervenors in the federal proceeding then filed a motion in the District Court to dismiss on the ground that under the Amendment, the court was without jurisdiction to determine federal water rights. Without deciding the jurisdictional question, the District Court, on June 21, 1973, granted the motion in an unreported oral opinion stating that the doctrine of abstention required deference to the proceedings in Division 7. On appeal, the Court of Appeals for the Tenth Circuit reversed, *United States* v. *Akin*, 504 F. 2d 115 (1974), holding that the suit of the United States was within district-court jurisdiction under 28 U. S. C. § 1345, and that abstention was inappropriate. We granted certiorari to consider the important questions of whether the McCarran Amendment terminated jurisdiction of federal courts to adjudicate federal water rights and whether, if that jurisdiction was not terminated, the District Court's dismissal in this case was nevertheless appropriate. 421 U. S. 946 (1975). We reverse.

II

We first consider the question of district-court jurisdiction under 28 U. S. C. § 1345. That section provides

that the district courts shall have original jurisdiction over all civil actions brought by the Federal Government "[e]xcept as otherwise provided by Act of Congress." It is thus necessary to examine whether the McCarran Amendment is such an Act of Congress excepting jurisdiction under § 1345.

The McCarran Amendment does not by its terms, at least, indicate any repeal of jurisdiction under § 1345. Indeed, subsection (d) of the Amendment, which is uncodified, provides:

> "(d) None of the funds appropriated by this title may be used in the preparation or prosecution of the suit in the United States District Court for the Southern District of California, Southern Division, by the United States of America against Fallbrook Public Utility District, a public service corporation of the State of California, and others." Act of July 10, 1952, Pub. L. 495, § 208 (d), 66 Stat. 560.

In prohibiting the use of funds for the maintenance by the United States of a specific suit then pending in a District Court, subsection (d) plainly implies that the Amendment did not repeal the jurisdiction of district courts under § 1345 to adjudicate suits brought by the United States for adjudication of claimed federal water rights.[11]

Beyond its terms, the legislative history of the Amendment evidences no clear purpose to terminate any portion of § 1345 jurisdiction. Indeed, three bills, proposed at approximately the same time as the Amendment, which expressly would have had the effect of precluding suits by the United States in district court for the determina-

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[11] Jurisdiction in the specific District Court suit was based on 28 U. S. C. § 1345. See *United States* v. *Fallbrook Util. Dist.*, 101 F. Supp. 298 (SD Cal. 1951).

tion of water rights, failed of passage.[12] Further, the Senate report on the Amendment states: "The purpose of the proposed legislation, as amended, is to permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water . . . ." [13] Nothing in this statement of purpose indicates an intent correlatively to diminish federal-district-court jurisdiction. Similarly, Senator McCarran, who introduced the legislation in the Senate, stated in a letter made a part of the Senate report that the legislation was "not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream." [14]

In view of the McCarran Amendment's language and legislative history, controlling principles of statutory construction require the conclusion that the Amendment did not constitute an exception "provided by Act of Congress" that repealed the jurisdiction of district courts under § 1345 to entertain federal water suits. "When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation." *Rosencrans* v. *United States*, 165 U. S. 257, 262 (1897). See *Morton* v. *Mancari*, 417 U. S. 535, 549–551 (1974); *United States* v. *Jackson*, 302 U. S. 628, 632 (1938). "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton* v. *Mancari*, *supra*, at 550. Not only do the terms and legislative

[12] H. R. 7691, 82d Cong., 2d Sess. (1952); H. R. 5735, 82d Cong., 1st Sess. (1951); H. R. 5368, 82d Cong., 1st Sess. (1951).

[13] S. Rep. No. 755, 82d Cong., 1st Sess., 2 (1951).

[14] *Id.*, at 9.

history of the McCarran Amendment not indicate an intent to repeal § 1345, but also there is no irreconcilability in the operation of both statutes. The immediate effect of the Amendment is to give consent to jurisdiction in the state courts concurrent with jurisdiction in the federal courts over controversies involving federal rights to the use of water. There is no irreconcilability in the existence of concurrent state and federal jurisdiction. Such concurrency has, for example, long existed under federal diversity jurisdiction. Accordingly, we hold that the McCarran Amendment in no way diminished federal-district-court jurisdiction under § 1345 and that the District Court had jurisdiction to hear this case.[15]

III

We turn next to the question whether this suit nevertheless was properly dismissed in view of the concurrent state proceedings in Division 7.

A

First, we consider whether the McCarran Amendment provided consent to determine federal reserved rights held on behalf of Indians in state court. This is a question not previously squarely addressed by this Court, and given the claims for Indian water rights in this case, dismissal clearly would have been inappropriate if the state court had no jurisdiction to decide those claims. We conclude that the state court had jurisdiction over Indian water rights under the Amendment.

United States v. *District Court for Eagle County*, 401 U. S. 520 (1971), and *United States* v. *District Court for*

[15] The District Court also would have had jurisdiction of this suit under the general federal-question jurisdiction of 28 U. S. C. § 1331. For the same reasons, the McCarran Amendment did not affect jurisdiction under § 1331 either.

Water Div. 5, 401 U. S. 527 (1971), held that the provisions of the McCarran Amendment, whereby "consent is . . . given to join the United States as a defendant in any suit (1) for the adjudication . . . or (2) for the administration of [water] rights, where it appears that the United States is the owner . . . by appropriation under state law, by purchase, by exchange, or otherwise . . . ," subject federal reserved rights to general adjudication in state proceedings for the determination of water rights. More specifically, the Court held that reserved rights were included in those rights where the United States was "otherwise" the owner. *United States* v. *District Court for Eagle County, supra,* at 524. Though *Eagle County* and *Water Div. 5* did not involve reserved rights on Indian reservations, viewing the Government's trusteeship of Indian rights as ownership, the logic of those cases clearly extends to such rights. Indeed, *Eagle County* spoke of non-Indian rights and Indian rights without any suggestion that there was a distinction between them for purposes of the Amendment. 401 U. S., at 523.

Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions. *Eagle County* rejected the conclusion that federal reserved rights in general were not reached by the Amendment for the reason that the Amendment "[deals] with an all-inclusive statute concerning 'the adjudication of rights to the use of water of a river system.'" *Id.,* at 524. This consideration applies as well to federal water rights reserved for Indian reservations. And cogently, the Senate report on the Amendment observed:

> "In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper

> and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts." [16]

Thus, bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective.[17]

Finally, legislative history demonstrates that the McCarran Amendment is to be construed as reaching federal water rights reserved on behalf of Indians. It was unmistakably the understanding of proponents and opponents of the legislation that it comprehended water rights reserved for Indians. In the Senate hearings on the Amendment, participants for the Department of Justice and the Department of the Interior made clear that the proposal would include water rights reserved on behalf of

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[16] S. Rep. No. 755, *supra*, at 4–5.

[17] Indeed, if exclusion of Indian rights were the conclusion, conflicts between Indian and non-Indian rights, as well as practical matters of adjudication, might have the effect of requiring district-court adjudication of non-Indian along with Indian rights, thereby effectively vitiating our construction of the Amendment in *Eagle County* and *Water Div. 5*.

Indians.[18] In addition, the Senate report on the Amendment took note of a recommendation in a Department of the Interior report that no consent to suit be given as to Indian rights and rejected the recommendation.[19]

The Government argues that because of its fiduciary responsibility to protect Indian rights, any state-court jurisdiction over Indian property should not be recognized unless expressly conferred by Congress. It has been recognized, however, that an action for the destruction of personal property may be brought against an Indian tribe where "[a]uthority to sue . . . is implied." *Turner* v. *United States*, 248 U. S. 354, 358 (1919). Moreover, the Government's argument rests on the incorrect assumption that consent to state jurisdiction for the purpose of determining water rights imperils those rights or in some way breaches the special obligation of the Federal Government to protect Indians. Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court for their declaration, a suit which, absent the consent of the Amendment, would eventually be necessitated to resolve conflicting claims to a scarce resource. The Government has not abdicated any responsibility fully to defend Indian rights in state court, and Indian interests may be satisfactorily protected under regimes of state law. See 25 U. S. C. §§ 1321, 1322; 28 U. S. C. § 1360.[20] Cf.

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[18] See Hearings on S. 18 before the Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess., 6–7, 67–68 (1951).

[19] S. Rep. No. 755, *supra*, at 2, 7–8.

[20] To be sure, 25 U. S. C. § 1322 (b) and 28 U. S. C. § 1360 (b) provide that nothing in those sections "shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [any real or personal property, including water rights, belonging to any Indian or any Indian tribe . . . that is held in trust by the United States]." This provision in

California Oregon Power Co. v. *Beaver Portland Cement Co.*, 295 U. S. 142, 164 n. 2 (1935). The Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights. Moreover, as *Eagle County* said, "questions [arising from the collision of private rights and reserved rights of the United States], including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed [by the Supreme Court] after final judgment by the Colorado court." 401 U. S., at 526.

B

Next, we consider whether the District Court's dismissal was appropriate under the doctrine of abstention. We hold that the dismissal cannot be supported under that doctrine in any of its forms.

Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185, 188–189 (1959). "[I]t was

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both sections, however, only qualifies the import of the general consent to state jurisdiction given by those sections. It does not purport to limit the special consent to jurisdiction given by the McCarran Amendment. A contrary conclusion is foreclosed by the principle of construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U. S. 535, 550–551 (1974).

never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." *Alabama Pub. Serv. Comm'n* v. *Southern R. Co.*, 341 U. S. 341, 361 (1951) (Frankfurter, J., concurring in result). Our decisions have confined the circumstances appropriate for abstention to three general categories.

(a) Abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *County of Allegheny* v. *Frank Mashuda Co., supra,* at 189. See, *e. g., Lake Carriers Assn.* v. *MacMullan,* 406 U. S. 498 (1972); *United Gas Pipeline Co.* v. *Ideal Cement Co.,* 369 U. S. 134 (1962); *Railroad Comm'n of Texas* v. *Pullman Co.,* 312 U. S. 496 (1941). This case, however, presents no federal constitutional issue for decision.

(b) Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar. *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25 (1959), for example, involved such a question. In particular, the concern there was with the scope of the eminent domain power of municipalities under state law. See also *Kaiser Steel Corp.* v. *W. S. Ranch Co.,* 391 U. S. 593 (1968); *Hawks* v. *Hamill,* 288 U. S. 52 (1933). In some cases, however, the state question itself need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. In *Burford* v. *Sun Oil Co.,* 319 U. S. 315 (1943), for example, the Court held that a suit seeking review of the reasonableness under Texas state law of a state commission's permit to drill oil

wells should have been dismissed by the District Court. The reasonableness of the permit in that case was not of transcendent importance, but review of reasonableness by the federal courts in that and future cases, where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields. See also *Alabama Pub. Serv. Comm'n* v. *Southern R. Co., supra.*[21]

The present case clearly does not fall within this second category of abstention. While state claims are involved in the case, the state law to be applied appears to be settled. No questions bearing on state policy are presented for decision. Nor will decision of the state claims impair efforts to implement state policy as in *Burford.* To be sure, the federal claims that are in-

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[21] We note that *Burford* v. *Sun Oil Co.,* and *Alabama Pub. Serv. Comm'n* v. *Southern R. Co.,* differ from *Louisiana Power & Light Co.* v. *City of Thibodaux,* and *County of Allegheny* v. *Frank Mashuda Co.,* in that the former two cases, unlike the latter two, raised colorable constitutional claims and were therefore brought under federal-question, as well as diversity, jurisdiction. While abstention in *Burford* and *Alabama Pub. Serv.* had the effect of avoiding a federal constitutional issue, the opinions indicate that this was not an additional ground for abstention in those cases. See *Alabama Pub. Serv. Comm'n* v. *Southern R. Co.,* 341 U. S., at 344; *Burford* v. *Sun Oil Co.,* 319 U. S., at 334; H. Hart & H. Wechsler, The Federal Courts and the Federal System 1005 (2d ed. 1973) ("The two groups of cases share at least one common characteristic: the Pullman purpose of avoiding the necessity for federal constitutional adjudication is not relevant"). We have held, of course, that the opportunity to avoid decision of a constitutional question does not alone justify abstention by a federal court. See *Harman* v. *Forssenius,* 380 U. S. 528 (1965); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964). Indeed, the presence of a federal basis for jurisdiction may raise the level of justification needed for abstention. See *Burford* v. *Sun Oil Co., supra,* at 318 n. 5; *Hawks* v. *Hamill,* 288 U. S., at 61.

volved in the case go to the establishment of water rights which may conflict with similar rights based on state law. But the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction. See *Meredith* v. *Winter Haven*, 320 U. S. 228 (1943); *Kline* v. *Burke Constr. Co.*, 260 U. S. 226 (1922); *McClellan* v. *Carland*, 217 U. S. 268 (1910). The potential conflict here, involving state claims and federal claims, would not be such as to impair impermissibly the State's effort to effect its policy respecting the allocation of state waters. Nor would exercise of federal jurisdiction here interrupt any such efforts by restraining the exercise of authority vested in state officers. See *Pennsylvania* v. *Williams*, 294 U. S. 176 (1935); *Hawks* v. *Hamill*, *supra*.

(c) Finally, abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, *Younger* v. *Harris*, 401 U. S. 37 (1971); *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943); [22] state nuisance proceedings antecedent to a criminal prosecution, which are directed at obtaining the closure of places exhibiting obscene films, *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975); or collection of state taxes, *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943). Like the previous two categories, this category also does not include this case. We deal here neither with a criminal proceeding, nor such a nuisance proceeding, nor a tax collection. We also do not deal with an attempt to restrain such actions [23] or to seek a

[22] Where a case is properly within this category of cases, there is no discretion to grant injunctive relief. See *Younger* v. *Harris*. But cf. *Samuels* v. *Mackell*, 401 U. S. 66, 73 (1971).

[23] Our reasons for finding abstention inappropriate in this case make it unnecessary to consider when, if at all, abstention would be appropriate where the Federal Government seeks to invoke federal

declaratory judgment as to the validity of a state criminal law under which criminal proceedings are pending in a state court.

C

Although this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Kerotest Mfg. Co.* v. *C–O–Two Fire Equipment Co.*, 342 U. S. 180, 183 (1952). See *Columbia Plaza Corp.* v. *Security National Bank*, 173 U. S. App. D. C. 403, 525 F. 2d 620 (1975). Generally, as between state and federal courts, the rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . ." *McClellan* v. *Carland, supra*, at 282. See *Donovan* v. *City of Dallas*, 377 U. S. 408 (1964). As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation. See *Kerotest Mfg. Co.* v. *C–O–Two Fire Equipment Co., supra; Steelman* v. *All Continent Corp.*, 301 U. S. 278 (1937); *Landis* v. *North American Co.*, 299 U. S. 248, 254 (1936). This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them. *England* v. *Medical Examiners*, 375 U. S. 411,

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jurisdiction. Cf. *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220 (1957).

415 (1964); *McClellan* v. *Carland, supra,* at 281; *Cohens* v. *Virginia,* 6 Wheat. 264, 404 (1821) (dictum). Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist.

It has been held, for example, that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts. *Donovan* v. *City of Dallas, supra,* at 412; *Princess Lida* v. *Thompson,* 305 U. S. 456, 466 (1939); *United States* v. *Bank of New York Co.,* 296 U. S. 463, 477 (1936). But cf. *Markham* v. *Allen,* 326 U. S. 490 (1946); *United States* v. *Klein,* 303 U. S. 276 (1938). This has been true even where the Government was a claimant in existing state proceedings and then sought to invoke district-court jurisdiction under the jurisdictional provision antecedent to 28 U. S. C. § 1345. *United States* v. *Bank of New York Co., supra,* at 479. But cf. *Leiter Minerals, Inc.* v. *United States,* 352 U. S. 220, 227–228 (1957). In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, cf. *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501 (1947); the desirability of avoiding piecemeal litigation, cf. *Brillhart* v. *Excess Ins. Co.,* 316 U. S. 491, 495 (1942); and the order in which jurisdiction was obtained by the concurrent forums, *Pacific Live Stock Co.* v. *Oregon Water Bd.,* 241 U. S. 440, 447 (1916). No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exer-

cise is required. See *Landis* v. *North American Co., supra,* at 254–255. Only the clearest of justifications will warrant dismissal.

Turning to the present case, a number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. See *Pacific Live Stock Co.* v. *Oregon Water Bd., supra,* at 449. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.

As has already been observed, the Colorado Water Rights Determination and Administration Act established such a system for the adjudication and management of rights to the use of the State's waters. As the Government concedes [24] and as this Court recognized in *Eagle County* and *Water Div. 5,* the Act established a single continuous proceeding for water rights adjudication which antedated the suit in District Court. *United States* v. *District Court for Eagle County,* 401 U. S., at 525; *United States* v. *District Court for Water Div. 5,*

[24] See Brief for United States 46–49.

401 U. S., at 529. That proceeding "reaches all claims, perhaps month by month but inclusively in the totality." *Ibid.* Additionally, the responsibility of managing the State's waters, to the end that they be allocated in accordance with adjudicated water rights, is given to the State Engineer.

Beyond the congressional policy expressed by the McCarran Amendment and consistent with furtherance of that policy, we also find significant (a) the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss,[25] (b) the extensive involvement of state water rights occasioned by this suit naming 1,000 defendants, (c) the 300-mile distance between the District Court in Denver and the court in Division 7, and (d) the existing participation by the Government in Division 4, 5, and 6 proceedings. We emphasize, however, that we do not overlook the heavy obligation to exercise jurisdiction. We need not decide, for example, whether, despite the McCarran Amendment, dismissal would be warranted if more extensive proceedings had occurred in the District Court prior to dismissal, if the involvement of state water rights were less extensive than it is here, or if the state proceeding were in some respect inadequate to resolve the federal claims. But the opposing factors here, particularly the policy underlying the McCarran Amendment, justify the District Court's dismissal in this particular case.[26]

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[25] As we have observed, the complaint was filed in District Court on November 14, 1972. The Federal Government was served in the state proceedings on January 3, 1973. Shortly thereafter, on February 13, 1973, a motion to dismiss was filed in District Court. Up to this point, it does not appear the District Court dealt in any other manner with the suit pending before it.

[26] Whether similar considerations would permit dismissal of a water suit brought by a private party in federal district court is a question we need not now decide.

The judgment of the Court of Appeals is reversed and the judgment of the District Court dismissing the complaint is affirmed for the reasons here stated.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS concur, dissenting.

The Court says that the United States District Court for the District of Colorado clearly had jurisdiction over this lawsuit. I agree.[1] The Court further says that the McCarran Amendment "in no way diminished" the District Court's jurisdiction. I agree.[2] The Court also says that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." I agree.[3] And finally, the Court says that nothing in the abstention doctrine "in any of its forms" justified the District Court's dismissal of the Government's complaint. I agree.[4] These views would seem to lead ineluctably to the conclusion that the District Court was wrong in dismissing the complaint. Yet the Court holds that the order of dismissal was "appropriate." With that conclusion I must respectfully disagree.

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[1] "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . . ." 28 U. S. C. § 1345.

[2] Nothing in the McCarran Amendment or in its legislative history can be read as limiting the jurisdiction of the federal courts. That law operates as no more than a *pro tanto* waiver of sovereign immunity. *United States* v. *District Court for Eagle County*, 401 U. S. 520; *United States* v. *District Court for Water Div. 5*, 401 U. S. 527.

[3] See *England* v. *Medical Examiners*, 375 U. S. 411, 415–416; *Meredith* v. *Winter Haven*, 320 U. S. 228.

[4] See *ante*, at 813–817.

In holding that the United States shall not be allowed to proceed with its lawsuit, the Court relies principally on cases reflecting the rule that where "control of the property which is the subject of the suit [is necessary] in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other." *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U. S. 189, 195. See also *Donovan* v. *City of Dallas*, 377 U. S. 408; *Princess Lida* v. *Thompson*, 305 U. S. 456; *United States* v. *Bank of New York Co.*, 296 U. S. 463. But, as those cases make clear, this rule applies only when exclusive control over the subject matter is necessary to effectuate a court's judgment. 1A J. Moore, Federal Practice ¶ 0.214 (1974). Here the federal court did not need to obtain *in rem* or *quasi in rem* jurisdiction in order to decide the issues before it. The court was asked simply to determine as a matter of federal law whether federal reservations of water rights had occurred, and, if so, the date and scope of the reservations. The District Court could make such a determination without having control of the river.

The rule invoked by the Court thus does not support the conclusion that it reaches. In the *Princess Lida* case, for example, the reason for the surrender of federal jurisdiction over the administration of a trust was the fact that a state court had already assumed jurisdiction over the trust estate. But the Court in that case recognized that this rationale "ha[d] no application to a case in a federal court . . . wherein the plaintiff seeks merely an adjudication of his right or his interest as a basis of a claim against a fund in the possession of a state court . . . ." 305 U. S., at 466. The Court stressed that "[n]o question is presented in the federal court as to the right of any person to participate in the res or as to the quantum of his interest in it." *Id.*, at 467. Similarly, in the

Bank of New York case, *supra*, the Court stressed that the "object of the suits is to take the property from the depositaries and from the control of the state court, and to vest the property in the United States . . . ." 296 U. S., at 478. "The suits are not merely to establish a debt or a right to share in property, and thus to obtain an adjudication which might be had without disturbing the control of the state court." *Ibid.*[5] See also *Markham* v. *Allen*, 326 U. S. 490; *United States* v. *Klein*, 303 U. S. 276. See generally 1A J. Moore, Federal Practice ¶ 0.222 (1974); 14 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3631, pp. 19–22 (1976).

The precedents cited by the Court thus not only fail to support the Court's decision in this case, but expressly point in the opposite direction. The present suit, in short, is not analogous to the administration of a trust, but rather to a claim of a "right to participate," since the United States in this litigation does not ask the court to control the administration of the river, but only to determine its specific rights in the flow of water in the river. This is an almost exact analogue to a suit seeking a determination of rights in the flow of income from a trust.

The Court's principal reason for deciding to close the doors of the federal courthouse to the United States in this case seems to stem from the view that its decision will avoid piecemeal adjudication of water rights.[6] To

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[5] *Donovan* v. *City of Dallas*, 377 U. S. 408, has relevance only insofar as the Court's opinion there contained a brief summary of the discussion in the *Princess Lida* case.

[6] The Court lists four other policy reasons for the "appropriateness" of the District Court's dismissal of this lawsuit. All of those reasons are insubstantial. First, the fact that no significant proceedings had yet taken place in the federal court at the time of the dismissal means no more than that the federal court was prompt in granting the defendants' motion to dismiss. At that time, of

the extent that this view is based on the special considerations governing *in rem* proceedings, it is without precedential basis, as the decisions discussed above demonstrate. To the extent that the Court's view is based on the realistic practicalities of this case, it is simply wrong, because the relegation of the Government to the state courts will not avoid piecemeal litigation.

The Colorado courts are currently engaged in two types of proceedings under the State's water-rights law. First, they are processing new claims to water based on recent appropriations. Second, they are integrating these new awards of water rights with all past decisions awarding such rights into one all-inclusive tabulation for each water source. The claims of the United States that are involved in this case have not been adjudicated in the past. Yet they do not involve recent appropriations of water. In fact, these claims are wholly dissimilar to normal state water claims, because they are not

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course, no proceedings involving the Government's claims had taken place in the state court either. Second, the geographic distance of the federal court from the rivers in question is hardly a significant factor in this age of rapid and easy transportation. Since the basic issues here involve the determination of the amount of water the Government intended to reserve rather than the amount it actually appropriated on a given date, there is little likelihood that live testimony by water district residents would be necessary. In any event, the Federal District Court in Colorado is authorized to sit at Durango, the headquarters of Water Division 7. 28 U. S. C. § 85. Third, the Government's willingness to participate in some of the state proceedings certainly does not mean that it had no right to bring this action, unless the Court has today unearthed a new kind of waiver. Finally, the fact that there were many defendants in the federal suit is hardly relevant. It only indicates that the federal court had all the necessary parties before it in order to issue a decree finally settling the Government's claims. Indeed, the presence of all interested parties in the federal court made the lawsuit the kind of unified proceeding envisioned by *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U. S. 440, 447–449.

based on actual beneficial use of water but rather on an intention formed at the time the federal land use was established to reserve a certain amount of water to support the federal reservations. The state court will, therefore, have to conduct separate proceedings to determine these claims. And only after the state court adjudicates the claims will they be incorporated into the water source tabulations. If this suit were allowed to proceed in federal court the same procedures would be followed, and the federal court decree would be incorporated into the state tabulation, as other federal court decrees have been incorporated in the past. Thus, the same process will occur regardless of which forum considers these claims. Whether the virtually identical separate proceedings take place in a federal court or a state court, the adjudication of the claims will be neither more nor less "piecemeal." Essentially the same process will be followed in each instance.[7]

As the Court says, it is the virtual "unflagging obligation" of a federal court to exercise the jurisdiction that has been conferred upon it. Obedience to that obligation is particularly "appropriate" in this case, for at least two reasons.

First, the issues involved are issues of federal law. A federal court is more likely than a state court to be familiar with federal water law and to have had experience in interpreting the relevant federal statutes, regulations,

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[7] It is true, as the Court notes, that the relationship among water rights is interdependent. When water levels in a river are low, junior appropriators may not be able to take any water from the river. The Court is mistaken, however, in suggesting that the determination of a priority is related to the determination of other priorities. When a priority is established, the holder's right to take a certain amount of water and the seniority (date) of his priority is established. That determination does not affect and is not affected by the establishment of other priorities.

and Indian treaties. Moreover, if tried in a federal court, these issues of federal law will be reviewable in a federal appellate court, whereas federal judicial review of the state courts' resolution of issues of federal law will be possible only on review by this Court in the exercise of its certiorari jurisdiction.

Second, some of the federal claims in this lawsuit relate to water reserved for Indian reservations. It is not necessary to determine that there is no state-court jurisdiction of these claims to support the proposition that a federal court is a more appropriate forum than a state court for determination of questions of life-and-death importance to Indians. This Court has long recognized that "'[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.'" *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 168, quoting *Rice* v. *Olson*, 324 U. S. 786, 789.

The Court says that "[o]nly the clearest of justifications will warrant dismissal" of a lawsuit within the jurisdiction of a federal court. In my opinion there was no justification at all for the District Court's order of dismissal in this case.

I would affirm the judgment of the Court of Appeals.

MR. JUSTICE STEVENS, dissenting.

While I join MR. JUSTICE STEWART's dissenting opinion, I add three brief comments:

First, I find the holding that the United States may not litigate a federal claim in a federal court having jurisdiction thereof particularly anomalous. I could not join such a disposition unless commanded to do so by an unambiguous statutory mandate or by some other clearly identifiable and applicable rule of law. The McCarran Amendment to the Department of Justice Appropriation

Act of 1953, 66 Stat. 560, 43 U. S. C. § 666, announces no such rule.

Second, the Federal Government surely has no lesser right of access to the federal forum than does a private litigant, such as an Indian asserting his own claim. If this be so, today's holding will necessarily restrict the access to federal court of private plaintiffs asserting water rights claims in Colorado. This is a rather surprising byproduct of the McCarran Amendment; for there is no basis for concluding that Congress intended that Amendment to impair the private citizen's right to assert a federal claim in a federal court.

Third, even on the Court's assumption that this case should be decided by balancing the factors weighing for and against the exercise of federal jurisdiction, I believe we should defer to the judgment of the Court of Appeals rather than evaluate those factors in the first instance ourselves. In this case the District Court erroneously dismissed the complaint on abstention grounds and the Court of Appeals found no reason why the litigation should not go forward in a federal court. Facts such as the number of parties, the distance between the courthouse and the water in dispute, and the character of the Colorado proceedings are matters which the Court of Appeals sitting in Denver is just as able to evaluate as are we.

Although I agree with Parts I, II, III–A, and III–B of the opinion of the Court, I respectfully dissent from the decision to reverse the judgment of the Court of Appeals for the Tenth Circuit.

GREER, COMMANDER, FORT DIX MILITARY RESERVATION, ET AL. *v.* SPOCK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74–848. Argued November 5, 1975—Decided March 24, 1976

Fort Dix, a federal military reservation devoted primarily to basic training for newly inducted Army personnel, and over which the Government exercises exclusive jurisdiction, permits free civilian access to certain unrestricted areas. However, post regulations ban speeches and demonstrations of a partisan political nature and also prohibit the distribution of literature without prior approval of post headquarters. Pursuant to these regulations the commanding officer of Fort Dix rejected the request of respondent candidates for President and Vice President to distribute campaign literature and hold a political meeting on the post, and the other respondents, who had been evicted on several occasions for distributing literature not previously approved, were barred from re-entering the post. Respondents brought suit to enjoin enforcement of these regulations on the ground that they violated the First and Fifth Amendments. The District Court issued an injunction prohibiting the military authorities from interfering with the making of political speeches or the distribution of leaflets in areas of Fort Dix open to the general public, and the Court of Appeals affirmed. *Held:*

1. The regulations are not constitutionally invalid on their face. Since under the Constitution it is the basic function of a military installation like Fort Dix to train soldiers, not to provide a public forum, and since, as a necessary concomitant to this basic function, a commanding officer has the historically unquestioned power to exclude civilians from the area of his command, any notion that federal military installations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is false, and therefore respondents had no generalized constitutional right to make political speeches or distribute leaflets at Fort Dix. *Flower* v. *United States*, 407 U. S. 197, distinguished. Pp. 834–838.

2. Nor were the regulations unconstitutionally applied under the circumstances of this case. Pp. 838–840.

(a) As to the regulation banning political speeches and demonstrations, there is no claim that the military authorities discriminated in any way among candidates based upon the candidates' supposed political views; on the contrary it appears that Fort Dix has a policy, objectively and evenhandedly applied, of keeping official military activities there wholly free of entanglement with any partisan political campaigns, a policy that the post was constitutionally free to pursue. Pp. 838–839.

(b) As to the regulation governing the distribution of literature, a military commander may disapprove only those publications that he perceives clearly endanger the loyalty, discipline, or morale of troops on the base under his command, and, while this regulation might in the future be applied irrationally, invidiously, or arbitrarily, none of the respondents even submitted any material for review, and the noncandidate respondents had been excluded from the post because they had previously distributed literature there without attempting to obtain approval. P. 840.

502 F. 2d 953, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 840. POWELL, J., filed a concurring opinion, in Part III of which BURGER, C. J., joined, *post*, p. 842. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 849. MARSHALL, J., filed a dissenting opinion, *post*, p. 872. STEVENS, J., took no part in the consideration or decision of the case.

Solicitor General Bork argued the cause for petitioners. With him on the brief were *Assistant Attorney General Lee, Deputy Solicitor General Randolph, Robert E. Kopp,* and *Anthony J. Steinmeyer.*

David Kairys argued the cause and filed a brief for respondents.*

**Norman Dorsen, Melvin L. Wulf,* and *Joel M. Gora* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

The Fort Dix Military Reservation is a United States Army post located in a predominantly rural area of central New Jersey. Its primary mission is to provide basic combat training for newly inducted Army personnel. Accordingly, most of its 55 square miles are devoted to military training activities. The Federal Government exercises exclusive jurisdiction over the entire area within Fort Dix, including the state and county roads that pass through it.[1] Civilian vehicular traffic is permitted on paved roads within the reservation, and civilian pedestrian traffic is permitted on both roads and footpaths. Military police regularly patrol the roads within the reservation, and they occasionally stop civilians and ask them the reason for their presence. Signs posted on the roads leading into the reservation state: "All vehicles are subject to search while on the Fort Dix Military Reservation" and "Soliciting prohibited unless approved by the commanding general." The main entrances to Fort Dix are not normally guarded, and a sign at one of the entrances says "Visitors Welcome." Civilians are freely permitted to visit unrestricted areas of the reservation.

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[1] See N. J. Stat. Ann. 52:30–2 (1955):

"Exclusive jurisdiction in and over any land . . . acquired by the United States is hereby ceded to the United States for all purposes except the service of process issued out of any of the courts of this state in any civil or criminal proceeding."

See also N. J. Stat. Ann. 27:5A–1 (1966):

"Whenever any public road or highway is located wholly or in part within the limits of a United States military reservation, the United States military authorities shall have the power, within the limits of such reservations, to police such roads and highways, to regulate traffic thereon, and to exercise such supervisory powers over such roads and highways as they may deem necessary to protect life and property on such military reservations."

Civilian speakers have occasionally been invited to the base to address military personnel. The subjects of their talks have ranged from business management to drug abuse. Visiting clergymen have, by invitation, participated in religious services at the base chapel. Theatrical exhibitions and musical productions have also been presented on the base. Speeches and demonstrations of a partisan political nature, however, are banned by Fort Dix Reg. 210–26 (1968), which provides that "[d]emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation." The regulation has been rigidly enforced: Prior to this litigation, no political campaign speech had ever been given at Fort Dix. Restrictions are also placed on another type of expressive activity. Fort Dix Reg. 210–27 (1970) provides that "[t]he distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies . . . is prohibited on the Fort Dix Military Reservation without prior written approval of the Adjutant General, this headquarters." [2]

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[2] This regulation does not permit the Fort Dix authorities to prohibit the distribution of conventional political campaign literature. The post regulation was issued in conformity with Army Reg. 210–10, ¶ 5–5 (c) (1970), which states that permission to distribute a publication may be withheld only where "it appears that the dissemination of [the] publication presents a clear danger to the loyalty, discipline, or morale of troops at [the] installation. . . ." The Army regulation further provides that if a base commander decides to withhold permission to distribute a publication, he shall "inform the next major commander and Headquarters, Department of the Army . . . and request . . . approval to prohibit the distribution of that publication or the particular issue thereof." ¶ 5–5 (d). The base commander may delay distribution of the publication in

In 1972, the respondents Benjamin Spock and Julius Hobson were the candidates of the People's Party for the offices of President and Vice President of the United States, and Linda Jenness and Andrew Pulley were the candidates of the Socialist Workers Party for the same offices. On September 9, 1972, Spock, Hobson, Jenness, and Pulley wrote a joint letter to Major General Bert A. David, then commanding officer of Fort Dix, informing him of their intention to enter the reservation on September 23, 1972, for the purpose of distributing campaign literature and holding a meeting to discuss election issues with service personnel and their dependents. On September 18, 1972, General David rejected the candidates'

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question pending approval or disapproval of his request by Army headquarters. *Ibid.*

A Department of the Army letter, dated June 23, 1969, entitled Guidance on Dissent, ¶ 5 (a)(3), gives as examples of materials which a commander need not allow to be distributed "publications which are obscene or otherwise unlawful (e. g., counselling disloyalty, mutiny, or refusal of duty)."

Commercial magazines and newspapers distributed through regular outlets such as post exchange newsstands need not be approved before distribution. Army Reg. 210–10, ¶¶ 5–5 (c), (d), does provide that a commander may delay, and the Department of the Army may prohibit, the distribution of particular issues of such publications through official outlets. See Department of the Army letter, *supra*, ¶ 5 (a)(1). The substantive standards for such restrictions are the same as those applicable to publications distributed other than through official outlets. *Id.*, ¶¶ 5 (a)(1), (2); Army Reg. 210–10, ¶ 5–5 (e). This provision of Army Reg. 210–10, ¶ 5–5, allowing commanders to halt the distribution of particular issues of publications through regular outlets appears to be inconsistent with Department of Defense Directive 1325.6, ¶ III (A)(1) (1969), which provides that "[a] Commander is not authorized to prohibit the distribution of a specific issue of a publication through official outlets such as post exchanges and military libraries." See Note, Prior Restraints in the Military, 73 Col. L. Rev. 1089, 1106 n. 127 (1973).

request, relying on Fort Dix Regs. 210–26 and 210–27.[3] Four of the other respondents, Ginaven, Misch, Hardy, and Stanton, were evicted from Fort Dix on various occasions between 1968 and 1972 for distributing literature not previously approved pursuant to Fort Dix Reg. 210–27. Each was barred from re-entering Fort Dix and advised that re-entry could result in criminal prosecution.[4]

On September 29, 1972, the respondents filed this suit in the United States District Court for the District of

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[3] General David's letter stated, in pertinent part:

"Your request to visit Fort Dix and campaign among our servicemen and women is denied.

"There are several compelling reasons for this denial which I shall enumerate. First, there are lawful regulations in effect which prohibit political speeches and similar activities on all of the Fort Dix Military Reservation (Fort Dix Regulation 210–26). The distribution of literature without prior approval of this headquarters is also prohibited (Fort Dix Regulation 210–27). Also, Department of the Army Regulations prohibit military personnel from participating in any partisan political campaign and further prohibits [*sic*] them from appearing at public demonstrations in uniform.

"The mission assigned to me as Commanding General of Fort Dix is to administer basic combat training to approximately 15,000 men at any given time. These men spend a period of eight weeks here during which they perform their training on very vigorous schedules occupying virtually all of their time. I am not in a position to dilute the quality of this training by expanding these schedules to include time to attend political campaigning and speeches. Political campaigning on Fort Dix cannot help but interfere with our training and other military missions.

"To decide otherwise could also give the appearance that you or your campaign is supported by me in my official capacity. I feel that I am prohibited from doing this for any candidate for public office."

[4] Title 18 U. S. C. § 1382, provides that "[w]hoever reenters or is found within [a military] reservation . . . after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—Shall be fined not more than $500 or imprisoned not more than six months, or both."

New Jersey to enjoin the enforcement of the Fort Dix regulations governing political campaigning and the distribution of literature, upon the ground that the regulations violated the First and Fifth Amendments of the Constitution. The District Court denied a preliminary injunction, *Spock* v. *David*, 349 F. Supp. 179, but the Court of Appeals reversed that order and directed that preliminary injunctive relief be granted to the respondents Spock, Hobson, Jenness, and Pulley. *Spock* v. *David*, 469 F. 2d 1047.[5] Pursuant to this judgment the respondent Spock conducted a campaign rally at a Fort Dix parking lot on November 4, 1972. The District Court subsequently issued a permanent injunction prohibiting the military authorities from interfering with the making of political speeches or the distribution of leaflets in areas of Fort Dix open to the general public,[6] and the Court of Appeals affirmed this final judgment. *Spock* v. *David*, 502 F. 2d 953. We granted certiorari to consider the important federal questions presented. 421 U. S. 908.

In reaching the conclusion that the respondents could not be prevented from entering Fort Dix for the purpose of making political speeches or distributing leaflets, the Court of Appeals relied primarily on this Court's *per curiam* opinion in *Flower* v. *United States*, 407 U. S. 197.

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[5] The Court of Appeals did not disturb the denial of preliminary relief to the four noncandidate respondents because their interests were not viewed as "so directly connected with [the upcoming Presidential] election, [or] so promptly and diligently pursued in the courts, as are the interests of the candidates. They make a lesser showing of immediate irreparable injury and possibly a lesser showing of likelihood of meeting the jurisdictional amount." 469 F. 2d, at 1056.

[6] The District Court dismissed the complaint as to Jenness and Pulley because they were below the constitutional age limits for the offices they sought. There was no appeal from that part of the District Court's judgment.

In the *Flower* case the Court summarily reversed the conviction of a civilian for entering a military reservation after his having been ordered not to do so. At the time of his arrest the petitioner in that case had been "quietly distributing leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston, San Antonio, Texas." *Ibid.* The Court's decision reversing the conviction, made without the benefit of briefing or oral argument, rested upon the premise that " 'New Braunfels Avenue was a completely open street,' " and that the military had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue." *Id.*, at 198. Under those circumstances, the "base commandant" could "no more order petitioner off this public street because he was distributing leaflets than could the city police order any leaflete[e]r off any public street." *Ibid.*

The decision in *Flower* was thus based upon the Court's understanding that New Braunfels Avenue was a public thoroughfare in San Antonio no different from all the other public thoroughfares in that city, and that the military had not only abandoned any right to exclude civilian vehicular and pedestrian traffic from the avenue, but also any right to exclude leafleteers—"any claim [of] special interests in who walks, talks, or distributes leaflets on the avenue."

That being so, the Court perceived the *Flower* case as one simply falling under the long-established constitutional rule that there cannot be a blanket exclusion of First Amendment activity from a municipality's open streets, sidewalks, and parks for the reasons stated in the familiar words of Mr. Justice Roberts in *Hague* v. *CIO*, 307 U. S. 496, 515–516:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been

> used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

See, *e. g., Niemotko* v. *Maryland,* 340 U. S. 268; *Saia* v. *New York,* 334 U. S. 558, 561 n. 2; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Jamison* v. *Texas,* 318 U. S. 413, 416; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Schneider* v. *State,* 308 U. S. 147.

The Court of Appeals was mistaken, therefore, in thinking that the *Flower* case is to be understood as announcing a new principle of constitutional law, and mistaken specifically in thinking that *Flower* stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now. The guarantees of the First Amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Adderley* v. *Florida,* 385 U. S. 39, 48. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.,* at 47. See also *Cox* v.

Louisiana, 379 U. S. 559, 560–564. Cf. *Pell* v. *Procunier*, 417 U. S. 817.

The Court of Appeals in the present case did not find, and the respondents do not contend, that the Fort Dix authorities had abandoned any claim of special interest in regulating the distribution of unauthorized leaflets or the delivery of campaign speeches for political candidates within the confines of the military reservation. The record is, in fact, indisputably to the contrary.[7] The *Flower* decision thus does not support the judgment of the Court of Appeals in this case.

Indeed, the *Flower* decision looks in precisely the opposite direction. For if the *Flower* case was decided the way it was because the military authorities had "abandoned any claim [of] special interests in who walks, talks, or distributes leaflets on the avenue," then the implication surely is that a different result must obtain on a military reservation where the authorities have *not* abandoned such a claim. And if that is not the conclusion clearly to be drawn from *Flower*, it most assuredly is the conclusion to be drawn from almost 200 years of American constitutional history.

One of the very purposes for which the Constitution was ordained and established was to "provide for the common defence," [8] and this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable.[9] In short, it

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[7] See n. 3, *supra*.

[8] U. S. Const. Preamble. See also U. S. Const., Art. I, § 8; Art. II, § 2.

[9] For illustrative recent decisions of this Court see, *e. g.*, *Schlesinger* v. *Councilman*, 420 U. S. 738; *Schlesinger* v. *Ballard*, 419 U. S. 498; *Parker* v. *Levy*, 417 U. S. 733; *Bell* v. *United States*, 366 U. S. 393; *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11; *Burns* v. *Wilson*, 346 U. S. 137; *Orloff* v. *Willoughby*, 345 U. S. 83; *Gusik* v. *Schilder*, 340 U. S. 128.

is "the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 17. And it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum.

A necessary concomitant of the basic function of a military installation has been "the historically unquestioned power of [its] commanding officer summarily to exclude civilians from the area of his command." *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 893. The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.

The respondents, therefore, had no generalized constitutional right to make political speeches or distribute leaflets at Fort Dix, and it follows that Fort Dix Regs. 210–26 and 210–27 are not constitutionally invalid on their face. These regulations, moreover, were not unconstitutionally applied in the circumstances disclosed by the record in the present case.[10]

With respect to Reg. 210–26, there is no claim that the military authorities discriminated in any way among candidates for public office based upon the candi-

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[10] The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.

dates' supposed political views.[11] It is undisputed that, until the appearance of the respondent Spock at Fort Dix on November 4, 1972, as a result of a court order, no candidate of any political stripe had ever been permitted to campaign there.

What the record shows, therefore, is a considered Fort Dix policy, objectively and evenhandedly applied, of keeping official military activities there wholly free of entanglement with partisan political campaigns of any kind. Under such a policy members of the Armed Forces stationed at Fort Dix are wholly free as individuals to attend political rallies, out of uniform and off base. But the military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates.

Such a policy is wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control. It is a policy that has been reflected in numerous laws and military regulations throughout our history.[12] And it is a policy that the military authorities at Fort Dix were constitutionally free to pursue.

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[11] Cf. *Jenness* v. *Forbes*, 351 F. Supp. 88 (RI).

[12] Members of the Armed Forces may not be polled by any person or political party to determine their choice among candidates for elective office, 18 U. S. C. § 596; it is unlawful to solicit political contributions in any fort or arsenal, 18 U. S. C. § 603; candidates for federal office are prohibited from soliciting contributions from military personnel, 18 U. S. C. § 602; no commissioned or noncommissioned officer in the Armed Forces may attempt to influence any member of the Armed Forces to vote for any particular candidate, 50 U. S. C. § 1475; no officer of the Armed Forces may "in any manner interfere with the freedom of any election in any State," 42 U. S. C. § 1972; a military officer may not have troops under his control at any place where a general or special election is held, 18 U. S. C. § 592. See also Army Reg. 600–20 (1971); Army Reg. 670–5 (1975).

With respect to Reg. 210–27, it is to be emphasized that it does not authorize the Fort Dix authorities to prohibit the distribution of conventional political campaign literature. The only publications that a military commander may disapprove are those that he finds constitute "a clear danger to [military] loyalty, discipline, or morale," and he "may not prevent distribution of a publication simply because he does not like its contents," or because it "is critical—even unfairly critical—of government policies or officials . . . ." [13] There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.

It is possible, of course, that Reg. 210–27 might in the future be applied irrationally, invidiously, or arbitrarily. But none of the respondents in the present case even submitted any material for review. The noncandidate respondents were excluded from Fort Dix because they had previously distributed literature there without even attempting to obtain approval for the distribution. This case, therefore, simply does not raise any question of unconstitutional application of the regulation to any specific situation. Cf. *Rescue Army* v. *Municipal Court*, 331 U. S. 549.

For the reasons set out in this opinion the judgment is reversed.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, concurring.

I concur in the Court's opinion, and also in Part III of MR. JUSTICE POWELL's concurring opinion.

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[13] Department of the Army letter, *supra*, n. 2, ¶¶ 5 (a)(1), (3).

Permitting political campaigning on military bases cuts against a 200-year tradition of keeping the military separate from political affairs, a tradition that in my view is a constitutional corollary to the express provision for civilian control of the military in Art. II, § 2, of the Constitution.

As MR. JUSTICE POWELL notes, however, Fort Dix Reg. 210–27—at least to the extent that it permits distribution of some political leaflets on military bases—cannot be justified as implementing this policy of separation or even as consistent with our tradition of separation. I agree that the regulation, insofar as it permits a military commander to avert a clear threat to the loyalty, discipline, or morale of his command, is justified by the requirements of military life and the mission of the Armed Forces. But a commander could achieve this goal in another way as well, by banning the distribution on base of *all* political leaflets; the hard question for me is whether the Constitution requires a ban on all distributions in order to preserve the separation of the military from politics. Although there are dangers in permitting any distribution of political materials on a military base, those dangers are of less magnitude and narrower in scope than the dangers involved in requiring the military to permit political rallies and campaigning on a base; the risk that soldiers will become identified with a particular candidate is, for example, less when a leaflet is handed out than when meetings or political rallies are held. The differences are substantial enough that the decision whether to permit conventional political material to be distributed is one properly committed to the judgment of the military authorities—whether or not they have exercised that judgment wisely in promulgating the regulation before us.

I would add only a note of caution. History demonstrates, I think, that the real threat to the independence

and neutrality of the military—and the need to maintain as nearly as possible a true "wall" of separation—comes not from the kind of literature that would fall within the prohibition of Reg. 210-27, but from the risk that a military commander might attempt to "deliver" his men's votes for a major-party candidate. This record, as the Court notes, presents no issue of discriminatory or improper enforcement, but that should not be taken as an indication that the issue is not one of serious dimensions. It is only a little more than a century ago that some officers of the Armed Forces, then in combat, sought to exercise undue influence either for President Lincoln or for his opponent, General McClellan, in the election of 1864.

MR. JUSTICE POWELL, concurring.

I join the Court's opinion, and express these additional thoughts.

I

This case presents the question whether campaign activities and face-to-face distribution of literature for other causes on a military base can be regulated and even prohibited because of the unique character of the Government property upon which the expression is to take place. Candidate respondents propose to use streets and other areas of Fort Dix that are open to the public for partisan political rallies and handbilling. Noncandidate respondents seek to distribute literature in these areas without prior approval by Fort Dix officials.

Although no prior decision of the Court is directly in point, the appropriate framework of analysis is settled. As MR. JUSTICE BRENNAN's dissenting opinion today recognizes, First Amendment rights are not absolute under all circumstances. They may be circumscribed when necessary to further a sufficiently strong public

interest. See *Pell* v. *Procunier*, 417 U. S. 817 (1974); *Adderley* v. *Florida*, 385 U. S. 39 (1966); *Cox* v. *Louisiana*, 379 U. S. 559 (1965). But our decisions properly emphasize that any significant restriction of First Amendment freedoms carries a heavy burden of justification. See, *e. g.*, *Buckley* v. *Valeo*, *ante*, at 64–65; *Grayned* v. *City of Rockford*, 408 U. S. 104, 116–117 (1972).

An approach analogous to that which must be employed in this case was described in *Grayned* v. *City of Rockford*, *supra*. The Court is to inquire "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." 408 U. S., at 116. See also *Pell* v. *Procunier*, *supra*, at 822; *Tinker* v. *Des Moines School District*, 393 U. S. 503, 509 (1969). As *Tinker* demonstrates, it is not sufficient that the area in which the right of expression is sought to be exercised be dedicated to some purpose other than use as a "public forum," or even that the primary business to be carried on in the area may be disturbed by the unpopular viewpoint expressed. *Id.*, at 508–509. Our inquiry must be more carefully addressed to the intrusion on the specific activity involved and to the degree of infringement on the First Amendment rights of the private parties. Some basic incompatibility must be discerned between the communication and the primary activity of an area.

In this case we deal with civilian expression in the domain of the military. Fort Dix is not only an area of property owned by the Government and dedicated to a public purpose. It is also the enclave of a system that stands apart from and outside of many of the rules that govern ordinary civilian life in our country:

> "A military organization is not constructed along democratic lines and military activities cannot be governed by democratic procedures. Military insti-

> tutions are necessarily far more authoritarian; military decisions cannot be made by vote of the interested participants. . . . [T]he existence of the two systems [military and civilian does not] mean that constitutional safeguards, including the First Amendment, have no application at all within the military sphere. It only means that the rules must be somewhat different." T. Emerson, The System of Freedom of Expression 57 (1970).

In this context our inquiry is not limited to claims that the exercise of First Amendment rights is disruptive of base activity. We also must consider their functional and symbolic incompatibility with the "specialized society separate from civilian society," *Parker* v. *Levy*, 417 U. S. 733, 743 (1974), that has its home on the base.[1]

II

I turn first to Fort Dix's ban on political activities, such as rallies, within the environs of the base.[2] With the

[1] I agree with the Court that the holding today is not inconsistent with our decision in *Flower* v. *United States*, 407 U. S. 197 (1972). We stressed there that the area in which the petitioner had distributed leaflets was an " 'important traffic artery' " in the city of San Antonio, equivalent in every relevant respect to a city street. Under the circumstances, the exercise of First Amendment activities along the thoroughfare was not incompatible with the neutrality or the disciplinary goals of the base proper. Fort Dix, in constrast, is a discrete military training enclave in a predominately rural area.

[2] Fort Dix Reg. 210–26 (1968) prohibits "[d]emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities." It is not clear whether "similar activities" include the distribution of leaflets with a partisan political content. I find it difficult to draw a principled distinction, in terms of the neutrality interests outlined below, between a small rally, a "street walking" campaign by a candidate, and the handing out of campaign literature by a candidate or his supporter. Therefore, I will assume for purposes of this discussion that Reg. 210–26 applies to all partisan activity.

majority, I have concluded that the legitimate interests of the public in maintaining the reality and appearance of the political neutrality of the Armed Services in this case outweigh the interests of political candidates and their servicemen audience in the availability of a military base for campaign activities. It may be useful to elaborate on the Court's identification of these interests.

This case bears some similarity to that before the Court in *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973). In that case the Court held that limitations on partisan political activities by federal employees were justified because it was necessary to insure that "the Government and its employees" in fact execute the laws impartially and that they appear to the public to be doing so, "if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.*, at 565. We emphasized that the limitations were narrowly drawn, leaving federal employees free to vote as they choose and to "express [their opinions] on political subjects and candidates." *Id.*, at 575–576.

In this case we are mindful of an equally strong tradition, now nearly two centuries old, of maintaining noninvolvement by the military in politics. As the Court has pointed out, this tradition is buttressed by numerous federal laws and military regulations. *Ante*, at 839 n. 12. The overriding reason for preserving this neutrality is noted in MR. JUSTICE BRENNAN's dissenting opinion:

> "It is the lesson of ancient and modern history that the major socially destabilizing influence in many European and South American countries has been a highly politicized military." *Post*, at 867.

This lesson may have prompted the constitutional requirement that the President be the Commander in Chief of the Armed Forces. U. S. Const., Art. II, § 2. Command of the Armed Forces placed in the political

head of state, elected by the people, assures civilian control of the military. Few concepts in our history have remained as free from challenge as this one. But complete and effective civilian control could be compromised by participation of the military *qua* military in the political process. There is also a legitimate public concern with the preservation of the appearance of political neutrality and nonpartisanship. There must be public confidence that civilian control remains unimpaired, and that undue military influence on the political process is not even a remote risk.

The exclusion of political rallies and face-to-face campaigning from a military base furthers both the appearance and the reality of political neutrality on the part of the military. Such an exclusion, for example, makes it less likely that candidates will fashion partisan appeals addressed to members of the Armed Services rather than to the public at large, whereas compelling bases to be open to campaigning would invite such appeals. Traditionally, candidates for office have observed scrupulously the principle of a politically neutral military and have not sought to identify or canvass a "military vote." If one candidate commences to tour military bases—or sends supporters for that purpose—others may feel compelled to follow. The temptation to focus on issues that specifically appeal to military personnel would be difficult to resist.

Even if no direct appeals to the military audience were made, the mere fact that one party or candidate consistently draws large crowds on military bases while another attracts only spotty attendance could—and probably would—be interpreted by the news media and the civilian public as indicating that the military supports one as opposed to the other. Questions also could arise as to whether pressures, direct or indirect, to support one

candidate or rally more generously than another were being exerted by commanders over enlisted personnel. And partisan political organizing and soliciting by soldiers within the base may follow.

The public interest in preserving the separation of the military from partisan politics places campaign activities on bases in a unique position. Unlike the normal civilian pedestrian and vehicular traffic that is permitted freely in Fort Dix, person-to-person campaigning may seriously impinge upon the separate and neutral status of the Armed Services in our society.

At the same time, the infringement on the individual First Amendment rights of the candidates and the servicemen is limited narrowly to the protection of the particular Government interest involved. Political communications reach military personnel on bases in every form except when delivered in person by the candidate or his supporters and agents. The prohibition does not apply to television, radio, newspapers, magazines, and direct mail. Nor could there be any prohibition on handing out leaflets and holding campaign rallies outside the limits of the base. Soldiers may attend off-base rallies as long as they do so out of uniform. The candidates, therefore, have alternative means of communicating with those who live and work on the Fort; and servicemen are not isolated from the information they need to exercise their responsibilities as citizens and voters. Our national policy has been to preserve a distinction between the role of the soldier and that of the citizen. See regulations cited *ante*, at 839 n. 12. A reasonable place to draw the line is between political activities on military bases and elsewhere. The military enclave is kept free of partisan influences, but individual servicemen are not isolated from participation as citizens in our democratic process.

In sum, the public interest in insuring the political neutrality of the military justifies the limited infringement on First Amendment rights imposed by Fort Dix authorities.[3]

III

The noncandidate respondents contest the Fort Dix regulation requiring prior approval of all handbill, pamphlet, and leaflet literature (even if nonpartisan) before distribution on the base. The public interest in military neutrality is not at issue here, but the restriction is more limited and is directed to another concern. Under Army Reg. 210–10, ¶ 5–5 (c) (1970), permission is to be denied only where dissemination of the literature poses a danger "to the loyalty, discipline, or morale of troops." This regulation is responsive to the unique need of the military to "insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U. S. 738, 757 (1975). We have said, in *Parker* v. *Levy*, 417 U. S., at 758, that "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."

Concern for morale and discipline is particularly strong where, as here, the primary function of the base is to provide basic combat training for new recruits. The basic training period is an especially difficult one for the

[3] Of course, if the base authorities were to permit any candidate or his supporters to engage in personal politicking on the base, the interest in military neutrality would then require that all candidates and their supporters be allowed. The base authorities cannot select among candidates and permit the supporters of some to canvass the base without engaging in improper partiality. There is no indication in the record, however, that the Fort Dix authorities ever have permitted partisan appeals to take place on the base.

newly inducted serviceman, for he must learn "the subordination of the desires and interests of the individual to the needs of the service." *Orloff* v. *Willoughby*, 345 U. S. 83, 92 (1953). For the first four weeks of the program the recruit must remain on the base. The military interest in preserving a relatively isolated sanctuary during this period justifies the limited restraints placed upon distribution of literature. Although the recruits may be exposed through the media and, perhaps, the mail to all views in civilian circulation, face-to-face persuasion by someone who urges, say, refusal to obey a superior officer's command, has an immediacy and impact not found in reading papers and watching television.

As the Court points out, there is no occasion to consider whether the regulation has been misapplied—or whether there are adequate procedural safeguards in the case of an adverse decision—for the noncandidate respondents have made no effort to obtain approval.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

Only four years ago, in a summary decision that presented little difficulty for most Members of this Court, we held that a peaceful leafleteer could not be excluded from the main street of a military installation to which the civilian public had been permitted virtually unrestricted access. Despite that decision in *Flower* v. *United States*, 407 U. S. 197 (1972), the Court today denies access to those desirous of distributing leaflets and holding a political rally on similarly unrestricted streets and parking lots of another military base. In so doing, the Court attempts to distinguish *Flower* from this case. That attempt is wholly unconvincing, both on the facts and in its rationale. I, therefore, dissent.

According to the Court, the record here is "indispu-

tably to the contrary" of that in *Flower*. *Ante*, at 837.[1] But in *Flower*, this Court relied on the following characterization of Fort Sam Houston—the military fort involved there—and its main street in holding that a peaceful leafleteer could not be excluded from that street.

> " 'There is no sentry post or guard at either entrance or anywhere along the route. Traffic flows through the post on this and other streets 24 hours a day. A traffic count conducted on New Braunfels Avenue on January 22, 1968, by the Director of Transportation of the city of San Antonio, shows a daily (24-hour) vehicular count of 15,110 south of Grayson Street (the place where the street enters the post boundary) and 17,740 vehicles daily north of that point. The street is an important traffic artery used freely by buses, taxi cabs and other public transportation facilities as well as by private vehicles, and its sidewalks are used extensively at all hours of the day by civilians as well as by military personnel. Fort Sam Houston was an open post; the street, New Braunfels Avenue, was a completely open street.' " 407 U. S., at 198, quoting *United States* v. *Flower*, 452 F. 2d 80, 90 (CA5 1971) (Simpson, J., dissenting).

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[1] In support of its characterization of the record as "indisputably to the contrary," the Court points to the Fort commander's response to respondent Spock's initial request to campaign at the Fort. *Ante*, at 837 n. 7. According to the Court, the commander's refusal to permit Spock's rally indicated that the military authorities had not " 'abandoned any claim [of] special interests in who walks, talks, or distributes leaflets . . . .' " See *ante*, at 837, quoting *Flower* v. *United States*, 407 U. S., at 198. The commander's response, however, came subsequent to a history of unimpeded civilian access to Fort Dix. Thus its after-the-fact, self-serving nature no more supports the assertion that the military authorities had not "abandoned any claim" than did the arrest of the defendant in *Flower*.

Fort Dix, at best, is no less open than Fort Sam Houston. No entrance to the Fort is manned by a sentry or blocked by any barrier. The reservation is crossed by 10 paved roads, including a major state highway. Civilians without any prior authorization are regular visitors to unrestricted areas of the Fort or regularly pass through it, either by foot or by auto, at all times of the day and night. Civilians are welcome to visit soldiers and are welcome to visit the Fort as tourists. They eat at the base and freely talk with recruits in unrestricted areas. Public service buses, carrying both civilian and military passengers, regularly serve the base. A 1970 traffic survey indicated that 66,000 civilian and military vehicles per day entered and exited the Fort. Indeed, the reservation is so open as to create a danger of muggings after payday and a problem with prostitution. There is, therefore, little room to dispute the Court of Appeals' finding in this case that "Fort Dix, when compared to Fort Sam Houston, is *a fortiori* an open post." *Spock* v. *David*, 469 F. 2d 1047, 1054 (CA3 1972). See Appendix to this opinion for photographic comparison of both forts.

The inconsistent results in *Flower* and this case notwithstanding, it is clear from the rationale of today's decision that despite *Flower* there is no longer room, under any circumstance, for the unapproved exercise of public expression on a military base. The Court's opinion speaks in absolutes, exalting the need for military preparedness and admitting of no careful and solicitous accommodation of First Amendment interests to the competing concerns that all concede are substantial. It parades general propositions useless to precise resolution of the problem at hand. According to the Court, "it is 'the primary business of armies and navies to fight or be ready to fight wars should the occasion arise,' *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 17," *ante*, at 837–838,

and "it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum," *ante*, at 838. But the training of soldiers does not as a practical matter require exclusion of those who would publicly express their views from streets and theater parking lots open to the general public. Nor does readiness to fight require such exclusion, unless, of course, the battlefields are the streets and parking lots, or the war is one of ideologies and not men.

With similar unenlightening generality, the Court observes: "One of the very purposes for which the Constitution was ordained and established was to 'provide for the common defence,' and this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable." *Ante*, at 837. But the Court overlooks the equally, if not more, compelling generalization that—to paraphrase the Court—one of the very purposes for which the First Amendment was adopted was to "secure the Blessings of Liberty to ourselves and our Posterity," [2] and this Court over the years has on countless occasions recognized the special constitutional function of the First Amendment in our national life, a function both explicit and indispensable.[3] Despite the Court's oversight, if the recent lessons of history mean anything, it is that the First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security.

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[2] U. S. Const., Preamble. See also U. S. Const., Amdt. 1.

[3] See, *e. g.*, *Buckley* v. *Valeo*, *ante*, p. 1; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975); *New York Times Co.* v. *United States*, 403 U. S. 713 (1971); *Cohen* v. *California*, 403 U. S. 15 (1971); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969); *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U. S. 624 (1943); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931).

Those interests "cannot be invoked as a talismanic incantation to support any exercise of . . . power." *United States* v. *Robel*, 389 U. S. 258, 263 (1967).[4] See *New York Times Co.* v. *United States*, 403 U. S. 713 (1971). In all cases where such interests have been advanced, the inquiry has been whether the exercise of First Amendment rights necessarily must be circumscribed in order to secure those interests.

This principle was reaffirmed as recently as *Buckley* v. *Valeo*, *ante*, p. 1, where we permitted significant interference with First Amendment freedoms in order to secure this country's eminent interest in the integrity of the political process. But even there, we required the employment of "means closely drawn to avoid unnecessary abridgment." *Ante*, at 25. This requirement was cogently expressed and supported by MR. CHIEF JUSTICE BURGER, writing separately in *Buckley:*

> "We all seem to agree that whatever the legitimate public interests in this area, proper analysis requires us to scrutinize the precise means employed to implement that interest. The balancing test used by the Court requires that fair recognition be given to competing interests. With respect, I suggest the Court has failed to give the traditional standing to some of the First Amendment values at stake here.

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[4] Indeed, as Mr. Chief Justice Warren observed in invalidating a portion of the Subversive Activities Control Act of 1950 as an unconstitutional abridgment of the First Amendment right of association:

"[T]his concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile." *United States* v. *Robel*, 389 U. S., at 264.

Specifically, it has failed to confine the particular exercise of governmental power within limits reasonably required.

"'In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' *Cantwell* v. *Connecticut*, 310 U. S. 296, 304 (1940).

"'Unduly' must mean not more than necessary, and until today, the Court has recognized this criterion in First Amendment cases:

"'In the area of First Amendment freedoms government has the duty to confine itself to *the least* intrusive regulations which are adequate for the purpose.' *Lamont* v. *Postmaster General*, 381 U. S. 301, 310 (1965) (BRENNAN, J., concurring). (Emphasis added.)

"Similarly, the Court has said:

"'[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.' *Shelton* v. *Tucker*, [364 U. S. 479, 488 (1960) (STEWART, J.)]." *Ante*, at 238–239 (concurring and dissenting).

Similarly, in *United States* v. *United States District Court*, 407 U. S. 297 (1972), this Court held that the concededly legitimate Government need to safeguard domestic security through wiretapping did not *ipso facto* vitiate protections vouchsafed by the Fourth Amendment, especially because such surveillance posed a threat to First Amendment interests. In particular, we held:

"As the Fourth Amendment is not absolute in its

terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression. If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken. *We must also ask whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.*" *Id.*, at 314–315 (emphasis supplied).[5]

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[5] The Court went on to observe and conclude:

"These contentions in behalf of a complete exemption from the warrant requirement, when urged on behalf of the President and the national security in its domestic implications, merit the most careful consideration. We certainly do not reject them lightly, especially at a time of worldwide ferment and when civil disorders in this country are more prevalent than in the less turbulent periods of our history. There is, no doubt, pragmatic force to the Government's position.

"But we do not think a case has been made for the requested departure from Fourth Amendment standards. . . . We recognize, as we have before, the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment. In this case we hold that this requires an appropriate prior warrant procedure.

. . . . . .

"Thus, we conclude that the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values. Nor do we think the Government's

If such is the necessary inquiry in the face of a critical Government interest where the First Amendment is only indirectly implicated, then no less careful an inquiry is compelled in this case where the First Amendment is directly implicated and the Government interest is no more important.

Finally, in *Pell* v. *Procunier*, 417 U. S. 817 (1974), this Court required that even in penal institutions "First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system." *Id.*, at 822. Accordingly, the Court did not abandon extensive analysis of the need for the restrictive prison regulation challenged there, even though "central to all other corrections goals [was] the institutional consideration of internal security within the corrections facilities themselves." *Id.*, at 823. Today, however, the Court gives no consideration to whether it is actually necessary to exclude all unapproved public expression from a military installation under all circumstances and, more particularly, whether exclusion is required of the expression involved here. It requires no careful composition of the interests at stake. Yet, as the Court also observed in *Pell*, "[c]ourts cannot . . . abdicate their constitutional responsibility to delineate and protect fundamental liberties." *Id.*, at 827. First Amendment principles especially demand no less.[6]

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domestic surveillance powers will be impaired to any significant degree. . . ." 407 U. S., at 319–321.

[6] The concurring opinion of my Brother POWELL properly recognizes at least the need for careful inquiry in such cases. But I completely disagree with his characterization of the need to secure the Government's interest in a politically neutral military as an interest protected by prohibiting conduct of "symbolic incompatibility" with a military base. *Ante*, at 844. I gather that by this notion of "symbolic incompatibility," my Brother POWELL means only to accord recognition to the interest in neutrality, an interest qualitatively different from the more immediate functional interest

True to these principles and unlike the Court's treatment of military interests, respondents' position is not that the First Amendment is unbending. Contrary to the intimations of today's decision, they do not contend that "[t]he guarantees of the First Amendment . . . [mean] 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" *Ante*, at 836. Respondents Spock and Hobson's initial letter to the Fort Dix commander indicating their intent to campaign on the base also indicated in unequivocal terms their willingness to confine the rally to such times and places as might reasonably be designated by petitioners.[7] The

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in training recruits. I, of course, have no quarrel with recognition of the interest. See *infra*, at 867. But that recognition as articulated by my Brother POWELL is so devoid of limiting principle as to contravene fundamentals of First Amendment jurisprudence. This Court many times has held protected by the First Amendment conduct which was "symbolically incompatible" with the activity upon which it impacted. See *Spence* v. *Washington*, 418 U. S. 405 (1974); *Procunier* v. *Martinez*, 416 U. S. 396 (1974); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U. S. 624 (1943). Indeed, the very symbolisms of many of our institutions have been the subject of criticisms held to be unassailably protected by the First Amendment.

[7] Spock and Hobson's letter, dated September 9, 1972, stated in pertinent part:

"As presidential and vice-presidential candidates, we intend to visit Fort Dix to campaign among the servicemen and servicewomen there. Both the Peoples Party and the Socialist Workers Party are addressing themselves to the special issues facing U. S. soldiers. For this reason we are bringing our respective campaigns wherever possible directly to the American G. I.

"The recent decision allowing G. I.'s stationed in New Jersey to register and vote there will undoubtedly result in an increased number of registered voters at the base, and an increased interest in the presidential contest. For that reason we are especially looking forward to campaigning at Fort Dix.

. . . . .

"It is not our intention to disrupt the normal functioning of the base

other respondents sought only to distribute leaflets in unrestricted areas. And, contrary to further intimations by today's decision, respondents do not go so far as to contend, nor did the Court of Appeals think, that "whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment," *ante*, at 836, or that "federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens," *ante*, at 838. Respondents carefully and appropriately distinguish between a military base considered as a whole and those portions of a military base open to the public.[8] And not only do respondents not go so far as to contend that open places constitute a "public forum," [9] but also they need not go so far. *Flower* never went so far as to find that Fort Sam Houston or its public streets were a public forum. Moreover, the determination that a locale is a "public forum" has never been erected as an absolute prerequisite to all forms of demonstrative First Amendment activity. In short, then, today's decision only serves to answer a set of broad, falsely formulated issues, and fails to provide the careful consideration of interests deserved by the First Amendment.

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and we will of course abide by any reasonable restrictions as to the time and places of our campaigning. Perhaps you would like to furnish us with a meeting hall or other such facility while we are on the post, where we might address interested soldiers. We will want to distribute our literature and talk to the soldiers about the issues that concern them.

"Our visit will take place on September 23, from about 10:30 A. M. to 2:00 P. M. If you have any questions concerning our plans, please contact us through our campaign offices." 1 App. 12–13.

[8] Brief for Respondents 23, 25–26.

[9] See *id.*, at 25–26.

It bears special note that the notion of "public forum" has never been the touchstone of public expression, for a contrary approach blinds the Court to any possible accommodation of First Amendment values in this case. In *Brown* v. *Louisiana*, 383 U. S. 131 (1966), for example, the First Amendment protected the use of a public library as a site for a silent and peaceful protest by five young black men against discrimination. There was no finding by the Court that the library was a public forum. Similarly, in *Edwards* v. *South Carolina*, 372 U. S. 229 (1963), the First Amendment protected a demonstration on the grounds of a state capitol building. Again, the Court never expressly determined that those grounds constituted a public forum. And in *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969), the First Amendment shielded students' schoolroom antiwar protest, consisting of the wearing of black armbands.[10] Moreover, none of the opinions that have expressly characterized locales as public forums has really gone that far, for a careful reading of those opinions reveals that their characterizations were always qualified, indicating that not every conceivable form of public expression would be protected. See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *Cox* v. *New Hampshire*, 312 U. S. 569 (1941); *Hague* v. *CIO*, 307 U. S. 496 (1939).

Those cases permitting public expression without characterizing the locale involved as a public forum, together with those cases recognizing the existence of a public forum, albeit qualifiedly, evidence the desirability of a

[10] Significantly, the Court observed in *Tinker:* "There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." 393 U. S., at 508.

flexible approach to determining when public expression should be protected. Realizing that the permissibility of a certain form of public expression at a given locale may differ depending on whether it is asked if the locale is a public forum or if the form of expression is compatible with the activities occurring at the locale, it becomes apparent that there is need for a flexible approach. Otherwise, with the rigid characterization of a given locale as not a public forum, there is the danger that certain forms of public speech at the locale may be suppressed, even though they are basically compatible with the activities otherwise occurring at the locale.

Not only does the Court's forum approach to public speech blind it to proper regard for First Amendment interests, but also the Court forecloses such regard by studied misperception of the nature of the inquiry required in *Flower*. In particular, this Court found controlling in *Flower* the determination that the military command of Fort Sam Houston had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue." 407 U. S., at 198. That was to say, that the virtually unrestricted admission of the public to certain areas of the Fort indicated that an exercise of public expression in those areas, such as distributing pamphlets, would not interfere with any military interests. Absent any interference, there could be no justification for selectively excluding every form of public expression, particularly a form no more disruptive than the civilian traffic already permitted. The abandonment required by *Flower* was not tantamount to a wholesale abdication of control, but rather was the yielding of base property to a use with which the exercise of the challenged form of public expression was not inconsistent. Thus, contrary to the Court's inaccurate reformulation, *Flower* did not go so far as to require

that the military "[abandon] any right to exclude civilian vehicular and pedestrian traffic," *ante,* at 835, or "[abandon] any claim of special interest in regulating" public expression before such expression would be permitted, *ante,* at 837. The military certainly could retain the right to exclude civilian traffic, but it could not choose freely to admit all such traffic save for the traffic in ideas. And the military certainly could retain an interest in reasonably regulating, but not in absolutely excluding, public expression. The Government does have the power "to preserve the property under its control for the use to which it is lawfully dedicated," *Adderley* v. *Florida,* 385 U. S. 39, 47 (1966) (quoted *ante,* at 836), provided the property remains so dedicated.

As applied in this case, the foregoing considerations require that the leaflet-distribution activities proposed by respondents be permitted in those streets and lots unrestricted to civilian traffic. Those areas do not differ in their nature and use from city streets and lots where open speech long has been protected. *Hague* v. *CIO, supra,* at 515. There is no credible claim here that distributing leaflets in those areas would impair to any significant degree the Government's interests in training recruits or, broadly, national defense.[11] See *United States* v. *United States District Court,* 407 U. S., at 321. This case, therefore, is unlike *Adderley* v. *Florida, supra.* There, though this Court held that the First Amendment did not protect a civil rights demonstration con-

[11] The only threat to their "mission" that military officials were able to articulate consisted of concerns that distributing leaflets or having a rally could possibly create crowds, engender partisan discussion, start an argument, or incite riots. *E. g.,* 1 App. 43–46, 48–49, 50–51, 64. "But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines School Dist.,* 393 U. S., at 508.

ducted on a jailhouse driveway, the Court was careful to observe that the "particular jail entrance and driveway were not normally used by the public," 385 U. S., at 45, and that the jail custodian "objected only to [the demonstrators'] presence on that part of the jail grounds reserved for jail uses," *id.*, at 47.

Unlike distributing leaflets, political rallies present some difficulty because of their potential for disruption even in unrestricted areas. But that a rally is disruptive of the usual activities in an unrestricted area is not to say that it is necessarily disruptive so as significantly to impair training or defense, thereby requiring its prohibition. Additionally, this Court has recognized that some quite disruptive forms of public expression are protected by the First Amendment. See *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940). In view of respondents' willingness to submit to reasonable regulation as to time, place, and manner, it hardly may be argued that Fort Dix's purpose was threatened here. Without more, it cannot be said that respondents' proposed rally was impermissible.

It is no answer to say that the commander of a military installation has the "historically unquestioned power . . . to exclude civilians from the area of his command." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 893 (1961). The Court's reliance on this proposition from *Cafeteria Workers* is misplaced. That case was only concerned with the procedural requisites for revocation of a security clearance on a military base, not with the range of permissible justifications for such revocation and, thereby, exclusion. Indeed, the "privilege" doctrine upon which rested the sweeping powers suggested by that case has long since been repudiated. *Board of Regents* v. *Roth*, 408 U. S. 564 (1972). But more important. that decision specifically recognized that

the Government was constrained by specific constitutional limitations, even in the exercise of its proprietary military functions. 367 U. S., at 897. Where the interference with Fort functions by public expression does not differ from that presented by other activities in unrestricted areas, the Fort command may no more preclude such expression, than " 'Congress may . . . "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office." ' " *Ibid.*, quoting *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947).

Similarly, it is no answer to say that the proposed activities in this case may be excluded because similar forms of expression have been evenhandedly excluded. An evenhanded exclusion of all public expression would no more pass constitutional muster than an evenhanded exclusion of all Roman Catholics. In any event, there can be no assertion that evenhanded exclusion here has in fact been the case because, as the Court implicitly concedes, *ante*, at 839, there have been no other instances where the privilege of engaging in public expression on the Fort was advanced.

Additionally, prohibiting the distribution of leaflets cannot be justified on the ground that that expression presents a "clear danger to [military] loyalty, discipline, or morale." *Ante*, at 840. This standard for preclusion is, in the face of a well-developed line of precedents, constitutionally inadequate. This Court long ago departed from "clear and present danger" as a test for limiting free expression. See *Hess* v. *Indiana*, 414 U. S. 105 (1973); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969); *Edwards* v. *South Carolina*, *supra*; *Scales* v. *United States*, 367 U. S. 203 (1961); *Yates* v. *United States*, 354 U. S. 298 (1957); *Dennis* v. *United States*, 341 U. S. 494 (1951). Yet the Court today, without reason, would fully reinstate that test and, indeed, would only require that the danger be clear, not even present. *Ante*, at

840. As Mr. Justice Holmes observed in dissent better than a half century ago: "It is only the present danger of immediate evil or an intent to bring it about that warrants . . . setting a limit to the expression of opinion." *Abrams* v. *United States*, 250 U. S. 616, 628 (1919). "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the [First Amendment]." *Id.*, at 630–631. Accepting for the moment, however, the validity of a "clear danger" test, I do not see, nor does the Court's opinion demonstrate, how a clear danger is presented in this case. No one has seriously contended that the activities involved here presented such a danger to military loyalty, discipline, or morale.

The response that no such showing was required in this case because respondents failed to furnish for prior approval the material they proposed for distribution will not suffice.[12] I first note that in view of the Court's essentially blanket preclusion of public expression from military installations, it is unnecessary for the Court

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[12] The Court further observes that the noncandidate respondents were also "excluded from Fort Dix because they had previously distributed literature there without even attempting to obtain approval for the distribution." *Ante*, at 840. This justification is wholly inadequate. It assumes that prior approval could have been validly required the first time respondents were excluded. As argued in the text, this page and 865–866, that assumption is incorrect. But even if it is correct, failure once to have sought approval clearly may not of itself justify exclusion when approval is sought on a subsequent occasion. First, 18 U. S. C. § 1382 only prohibits *unapproved* re-entry of those who have once been excluded from a military base; it does not give a base commander warrant for excluding such individuals on all future occasions. Second, if the activity for which those individuals seek subsequent approval is protected by the First Amendment, the fort commander may no more disapprove that activity because of the past transgression, than prohibit a person once convicted of selling obscene material from future sales of Lady Chatterley's Lover.

to reach this issue—save to the extent the Court unwittingly concedes the tenuousness of its total ban. *Alexander* v. *Louisiana*, 405 U. S. 625 (1972); *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring). See *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947). Most important, however, in advancing such a justification, the Court engages in a rude refusal even to acknowledge the firmly fixed limitation on governmental control of First Amendment activity afforded by the doctrine against prior restraints. The illegality of the restraint sought to be imposed in this case obviated any requirement that respondents submit to it, thereby risking irreparable injury to First Amendment interests. See *New York Times Co.* v. *United States*, 403 U. S., at 725–726, and n. (1971) (BRENNAN, J., concurring); *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

Requiring prior approval of expressive material before it may be distributed on base constitutes a system of prior restraint,[13] *Freedman* v. *Maryland, supra; Times Film Corp.* v. *Chicago*, 365 U. S. 43 (1961); a system "bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S., at 558; *New York Times Co.* v. *United States, supra*, at 714; *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931). "Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law." *Southeastern Promotions, Ltd.* v. *Conrad, supra*, at 553. The Court's tacit approval of the prior restraint imposed under Fort Dix Reg. 210–27 is therefore deeply disturbing. Not only does the Court approve a procedure whose validity need not even be considered in this case, but also it requires no rebuttal of the heavy presumption against

[13] Where a demonstrator seeks use of an area serving an inconsistent use, however, the restraint then permissible is, of course, not only prior, but absolute.

that validity. And I seriously doubt that the presumption would fall in this case.

First, while not every prior restraint is *per se* unconstitutional, the permissibility of such restraints has thus far been confined to a limited number of contexts. *Southeastern Promotions, Ltd.* v. *Conrad, supra,* at 559. The imposition of prior restraints on speech or the distribution of literature in public areas has been consistently rejected, except to the extent such restraints sought to control time, place, and circumstance rather than content. See *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92 (1972); *Hague* v. *CIO,* 307 U. S. 496 (1939); *Lovell* v. *City of Griffin,* 303 U. S. 444 (1938). Similarly, the content-oriented prior restraint of Reg. 210–27 has no place in the open areas of Fort Dix.

Second, "[t]he settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" *Southeastern Promotions, Ltd.* v. *Conrad, supra,* at 559, quoting *Freedman* v. *Maryland, supra,* at 58. But neither Fort Dix regulations nor any other applicable Army or Department of Defense guidelines require a prompt determination that publications may be distributed on the Fort. At the very least, therefore, there should be a requirement that the Fort commander promptly approve or disapprove publications proposed for distribution, lest failure to make a determination effectively result in censorship. See *Blount* v. *Rizzi,* 400 U. S. 410 (1971); *Southeastern Promotions, Ltd.* v. *Conrad, supra; Freedman* v. *Maryland, supra.*

The Court's final retreat in justifying the prohibitions upheld today is the principle of military neutrality. According to the Court, the military authorities of Fort Dix were free to pursue "the American constitutional tra-

dition of a politically neutral military." *Ante*, at 839. I could not agree more that the military should not become a political faction in this country. It is the lesson of ancient and modern history that the major socially destabilizing influence in many European and South American countries has been a highly politicized military. But it borders on casuistry to contend that by evenhandedly permitting public expression to occur in unrestricted portions of a military installation, the military will be viewed as sanctioning the causes there espoused.[14] If there is any risk of partisan involvement, real or apparent, it derives from the exercise of a choice, in this case, the Fort commander's choice to exclude respondents, while, for example, inviting speakers in furtherance of the Fort's religious program.[15] Additionally, the Court would do well to consider the very real system of prior restraint operative at Fort Dix, for the very fact that literature distributed on the Fort is subject to that system fosters the impression that it is disseminated with a military imprimatur.

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[14] As I observed in dissenting from this Court's decision upholding the preclusion of political, but not commercial, advertisement from municipally run buses:

" 'The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board.' *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 61, 434 P. 2d 982, 989 (1967). The city has introduced no evidence demonstrating that its rapid transit passengers would naively think otherwise. And though there may be 'lurking doubts about favoritism,' *ante*, at 304, the Court has held that '[n]o such remote danger can justify the immediate and crippling impact on the basic constitutional rights involved in this case.' *Williams* v. *Rhodes*, 393 U. S., at 33." *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 321 (1974).

[15] 1 App. 54–55.

More fundamentally, however, the specter of partiality does not vanish with the severing of all partisan contact. It is naive to believe that any organization, including the military, is value neutral. More than this, where the interests and purpose of an organization are peculiarly affected by national affairs, it becomes highly susceptible of politicization. For this reason, it is precisely the nature of a military organization to tend toward that end.[16] That tendency is only facili-

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[16] The testimony in the District Court of the officer representing the commanding officer of Fort Dix is exemplary:

"Q I see. Well, doesn't the war with Vietnam deal with your mission?

"A Oh, yes.

"Q Well, what I guess I am trying to get at is isn't it true that the content of what a proposed visitor intends to say is the basis for whether he is allowed to come on or not? If, for instance, he says 'I intend to urge the soldiers not to use drugs,' that, from what you have said, would be something that the Base might favorably look on. If he is going to inform them of some management principle that they are not aware of—

"A That would further our mission, yes.

"Q But if they are to speak against the war in Vietnam—

"A That certainly wouldn't forward our mission, would it?

"Q So the content of what they are to say, that is the basis of whether or not they are approved?

"A Yes, to a great extent." 1 App. 64.

"It appears highly likely . . . that the military in the post-Vietnam period will increasingly diverge along a variety of dimensions from the mainstream of developments in the general society." Moskos, Armed Forces and American Society: Convergence or Divergence?, in Public Opinion and the Military Establishment 271, 277 (C. Moskos ed. 1971). "[T]he military is undergoing a fundamental turning inward in its relations to the civilian structures of American society." *Ibid.*

"[T]he probability of sustained internal agitation or even questioning of the military system is unlikely once the war in Southeast Asia ends. With the advent of a curtailed draft or all-volunteer force, the military will find its membership much more

tated by action that serves to isolate the organization's members from the opportunity for exposure to the moderating influence of other ideas, particularly where, as with the military, the organization's activities pervade the lives of its members. For this reason, any unnecessary isolation only erodes neutrality and invites the danger that neutrality seeks to avoid.

In *Hudgens* v. *NLRB, ante,* p. 507, as in today's decision, this Court recently moved to narrow the opportunities for free expression in our society. In *Hudgens,* the Court also preached of its institutional duty to declare overruled a case whose rationale did not survive that of a succeeding case. I would maintain that the Court's duty is to recognize the irreconcilability of two decisions and then to explain why it chooses one over the other. But accepting for the moment the Court's perception of its duty, I note that the Court today declines to overrule *Flower.* I presume, therefore, that some meaningful distinction must exist between that decision and today's. But if any significant distinction remains between the cases, it is that in *Flower* the private party was an innocuous leafleteer and here the private parties include one of this country's most vociferous opponents of the exercise of military power.[17] That

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acquiescent to established procedures and organizational goals. Without broadly based civilian representation, the leavening effect of recalcitrant servicemen—drafted enlisted men and ROTC officers—will be no more. It appears that while our civilian institutions are heading toward more participative definition and control, the post-Vietnam military will follow a more conventional and authoritarian social organization. . . ." *Id.,* at 292.

[17] My Brother POWELL's concurrence correctly so highlights this case: "Traditionally, candidates for office have observed scrupulously the principle of a politically neutral military and have not sought to identify or canvass a military vote.'" *Ante,* at 846. I do not believe, however, that the principle of military neutrality goes so

is hardly a distinction upon which to render a decision circumscribing First Amendment protections.

I would, for these reasons, affirm the judgment of the Court of Appeals.

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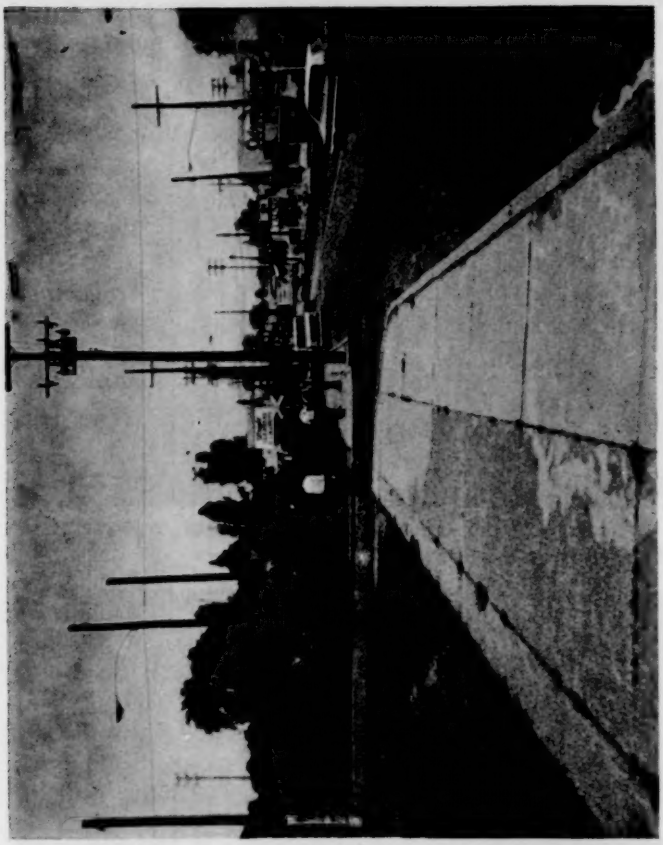
far as to control the content or the audience of address of political speech. And I can think of no poorer warrant for abridging the values protected by the First Amendment than tradition. The principle of military neutrality is concerned, not with precluding exposure of the military to political issues, but with preventing the military from becoming a political faction by its very isolation from political discourse or selective exposure to such discourse. See n. 16, *supra*. To be sure, "[a]lthough the recruits may be exposed through the media and, perhaps, the mail to all views in civilian circulation, face-to-face persuasion by someone who urges, say, refusal to obey a superior officer's command, has an immediacy and impact not found in reading papers and watching television." *Ante*, at 849. But there is here no allegation of such an immediate threat to base order. Nor do I perceive any basis for properly imputing the threat of such illegal conduct to respondent Spock or any of the other respondents.

APPENDIX TO OPINION OF BRENNAN, J., DISSENTING

"Visitors Welcome" sign on roadside adjacent to New Jersey Route 68 entrance to Fort Dix.

Main entrance to Fort Sam Houston in *Flower* (arrow indicates sidewalk on which defendant was arrested).



Respondents Ginaven and Misch distributing pamphlets, just prior to their arrest, inside Wrightstown, N. J., entrance to Fort Dix.

MR. JUSTICE MARSHALL, dissenting.

While I concur fully in MR. JUSTICE BRENNAN's dissent, I wish to add a few separate words. I am deeply concerned that the Court has taken its second step in a single day toward establishing a doctrine under which any military regulation can evade searching

constitutional scrutiny simply because of the military's belief—however unsupportable it may be—that the regulation is appropriate. We have never held—and, if we remain faithful to our duty, never will hold—that the Constitution does not apply to the military. Yet the Court's opinions in this case and in *Middendorf* v. *Henry*, 425 U. S. 25, holding the right to counsel inapplicable to summary court-martial defendants, go distressingly far toward deciding that fundamental constitutional rights can be denied to both civilians and servicemen whenever the military thinks its functioning would be enhanced by so doing.

The First Amendment infringement that the Court here condones is fundamentally inconsistent with the commitment of the Nation and the Constitution to an open society. That commitment surely calls for a far more reasoned articulation of the governmental interests assertedly served by the challenged regulations than is reflected in the Court's opinion. The Court, by its unblinking deference to the military's claim that the regulations are appropriate, has sharply limited one of the guarantees that makes this Nation so worthy of being defended. I dissent.

Reporter's Note

The next page is purposely numbered 901. The numbers between 873 and 901 were intentionally omitted in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM FEBRUARY 12 THROUGH MARCH 23, 1976

FEBRUARY 12, 1976

Dismissal Under Rule 60

No. 75–561. AMERICAN ELECTRIC POWER SYSTEM ET AL. *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. [Certiorari granted, 423 U. S. 1047.] Certiorari dismissed as to petitioner Wisconsin Power & Light Co. under this Court's Rule 60.

FEBRUARY 23, 1976

Affirmed on Appeal

No. 75–757. OLD DOMINION FREIGHT LINE, INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. M. D. N. C.

No. 75–758. LEFKOVITS ET AL. *v.* STATE BOARD OF ELECTIONS ET AL. Affirmed on appeal from D. C. N. D. Ill. Reported below: 400 F. Supp. 1005.

Appeals Dismissed

No. 75–86. WALSH ET AL. *v.* MONTGOMERY COUNTY, MARYLAND, ET AL. Appeal from Ct. App. Md. dismissed for want of substantial federal question. MR. JUSTICE STEVENS took no part in the consideration or decision of this appeal. Reported below: 274 Md. 489, 336 A. 2d 97.

No. 75-834. HAMILTON *v.* VAN NATTA, COMMISSIONER, BUREAU OF MOTOR VEHICLES. Appeal from Ct. App. Ind. dismissed for want of substantial federal question. Reported below: — Ind. App. —, 323 N. E. 2d 659.

No. 75–881. HOOBAN *v.* BOARD OF GOVERNORS, WASHINGTON STATE BAR ASSN. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 85 Wash. 2d 774, 539 P. 2d 686.

No. 75–5945. HICKOX *v.* CALIFORNIA. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question.

No. 75–5980. JOHNSON *v.* ILLINOIS. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 27 Ill. App. 3d 1047, 327 N. E. 2d 219.

No. 75–921. WILD *v.* RARIG ET AL. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: — Minn. —, 234 N. W. 2d 775.

No. 75–5915. JONES *v.* SOUTHERN HOME INSURANCE CO. Appeal from Ct. App. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 135 Ga. App. 385, 217 S. E. 2d 620.

No. 75–6015. SANCHEZ *v.* VALDEZ. Appeal from Sup. Ct. N. M. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 75–606. CONLISK, SUPERINTENDENT OF POLICE, ET AL. *v.* CALVIN ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for fur-

ther consideration in light of *Rizzo* v. *Goode*, 423 U. S. 362 (1976). Reported below: 520 F. 2d 1.

No. 75–5684. GRAHAM *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his brief for the United States filed January 9, 1976, judgment vacated and case remanded for further consideration in light of position presently asserted by the Government. MR. JUSTICE REHNQUIST would deny certiorari. Reported below: 521 F. 2d 812.

Miscellaneous Orders

No. 64, Orig. NEW HAMPSHIRE *v.* MAINE. Exceptions to Report of Special Master set for oral argument in due course. [For earlier orders herein, see, *e. g.*, 423 U. S. 1084.]

No. 73–7031. FOWLER *v.* NORTH CAROLINA. Sup. Ct. N. C. [Certiorari granted, 419 U. S. 963.] Order of this Court dated June 23, 1975 [422 U. S. 1039], insofar as it sets this case for reargument, is revoked.

No. 74–799. UNITED STATES *v.* FOSTER LUMBER CO., INC. C. A. 8th Cir. [Certiorari granted, 420 U. S. 1003.] Case restored to calendar for reargument.

No. 74–1318. DREW MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* ANDREWS ET AL. C. A. 5th Cir. [Certiorari granted, 423 U. S. 820.] Motion of petitioners for divided argument granted.

No. 74–1560. UNITED STATES *v.* MARTINEZ-FUERTE ET AL. C. A. 9th Cir. [Certiorari granted, 423 U. S. 822.] Motion of Los Angeles County Bar Assn. for leave to file a brief as *amicus curiae* denied. Motion of respondents to strike portion of petitioner's brief denied.

No. 74–1520. ELROD, SHERIFF, ET AL. *v.* BURNS ET AL. C. A. 7th Cir. [Certiorari granted, 423 U. S. 821.] Motion of Public Citizen for leave to file a brief as *amicus curiae* granted.

No. 74–6257. GREGG *v.* GEORGIA. Sup. Ct. Ga.;

No. 75–5394. JUREK *v.* TEXAS. Ct. Crim. App. Tex.;

No. 75–5491. WOODSON ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C.;

No. 75–5706. PROFFITT *v.* FLORIDA. Sup. Ct. Fla.; and

No. 75–5844. ROBERTS *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, 423 U. S. 1082.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 45 additional minutes allotted for that purpose.

No. 75–62. RUNYON ET UX., DBA BOBBE'S SCHOOL *v.* MCCRARY ET AL.;

No. 75–66. FAIRFAX-BREWSTER SCHOOL, INC. *v.* GONZALES ET AL.; and

No. 75–278. SOUTHERN INDEPENDENT SCHOOL ASSN. *v.* MCCRARY ET AL. C. A. 4th Cir. [Certiorari granted, 423 U. S. 945.] Motion of Anti-Defamation League of B'nai B'rith et al. for leave to file a brief as *amici curiae* in No. 75–62 granted. Motions of Council for American Private Education et al. and National Education Assn. for leave to file briefs as *amici curiae* granted.

No. 75–104. UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., ET AL. *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. [Certiorari granted, 423 U. S. 945.] Motion of respondents NAACP et al. for additional time and divided argument granted and 15 additional minutes allotted for that purpose. Petitioners also allotted 15 additional minutes for oral argument.

No. 75–130. QUINN, COMMISSIONER, CHICAGO FIRE DEPARTMENT *v.* MUSCARE. C. A. 7th Cir. [Certiorari granted, 423 U. S. 891.] Motions of Illinois Division of American Civil Liberties Union and coalition of American Public Employees for leave to file briefs as *amici curiae* granted.

No. 75–246. UNITED STATES *v.* HOPKINS. Ct. Cl. [Certiorari granted, 423 U. S. 821.] Motion of the Solicitor General to permit Robert B. Reich, Esquire, to present oral argument *pro hac vice* granted.

No. 75–251. FITZPATRICK ET AL. *v.* BITZER, CHAIRMAN, EMPLOYEES' RETIREMENT COMMISSION, ET AL.; and

No. 75–283. BITZER, CHAIRMAN, EMPLOYEES' RETIREMENT COMMISSION, ET AL. *v.* MATTHEWS ET AL. C. A. 2d Cir. [Certiorari granted, 423 U. S. 1031.] Motion of petitioners in No. 75–251 and of respondents in No. 75–283 for additional time for oral argument denied.

No. 75–252. MEACHUM, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* FANO ET AL. C. A. 1st Cir. [Certiorari granted, 423 U. S. 1013.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose.

No. 75–260. MCDONALD ET AL. *v.* SANTA FE TRAIL TRANSPORTATION CO. ET AL. C. A. 5th Cir. [Certiorari granted, 423 U. S. 923.] Motion of NAACP Legal Defense & Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted.

No. 75–6019. NELSON *v.* GAGNON, WARDEN; and

No. 75–6133. BOWERSKI *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 75–339. BUFFALO FORGE CO. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 2d Cir. [Certiorari granted, 423 U. S. 911.] Motion of respondent United Steelworkers of America, AFL–CIO, to file a joint brief with American Federation of Labor & Congress of Industrial Organizations as *amicus curiae* denied.

No. 75–491. UNITED STATES *v.* AGURS. C. A. D. C. Cir. [Certiorari granted, 423 U. S. 983.] Motion of respondent to preclude filing of brief of petitioner denied.

No. 75–817. NEBRASKA PRESS ASSN. ET AL. *v.* STUART, JUDGE, ET AL. Sup. Ct. Neb. [Certiorari granted, 423 U. S. 1027.] Motion of petitioners for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument. Motion of respondent Erwin Charles Simants for leave to proceed *in forma pauperis* granted.

No. 75–855. BROWN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS ET AL.;

No. 75–5421. GREEN *v.* HUNTER, U. S. DISTRICT JUDGE; and

No. 75–5956. BONNER *v.* UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT. Motions for leave to file petitions for writs of mandamus denied.

No. 75–5962. NEAL *v.* CASWELL, JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

Probable Jurisdiction Noted

No. 75–699. MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* GOLDFARB. Appeal from D. C. E. D. N. Y. Probable jurisdiction noted. Reported below: 396 F. Supp. 308.

No. 75–831. TULLY ET AL. *v.* GRIFFIN, INC. Appeal from D. C. Vt. Probable jurisdiction noted. Reported below: 404 F. Supp. 738.

No. 75–839. WHALEN, COMMISSIONER OF HEALTH OF NEW YORK *v.* ROE ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 403 F. Supp. 931.

Certiorari Granted

No. 75–212. UNITED STATES *v.* DONOVAN ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 513 F. 2d 337.

No. 75–657. LOCAL 3489, UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. *v.* USERY, SECRETARY OF LABOR. C. A. 7th Cir. Certiorari granted. Reported below: 520 F. 2d 516.

No. 75–661. UNITED STATES *v.* ANTELOPE ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 523 F. 2d 400.

No. 75–853. UNITED STATES STEEL CORP. ET AL. *v.* FORTNER ENTERPRISES, INC. C. A. 6th Cir. Certiorari granted. Reported below: 523 F. 2d 961.

No. 75–929. ESTELLE, CORRECTIONS DIRECTOR, ET AL. *v.* GAMBLE. C. A. 5th Cir. Certiorari granted. Reported below: 516 F. 2d 937.

No. 75–811. SUPERIOR COURT OF THE DISTRICT OF COLUMBIA ET AL. *v.* PALMORE ET AL.; and SWAIN, REFORMATORY SUPERINTENDENT *v.* PRESSLEY. C. A. D. C. Cir. Motions of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 169 U. S. App. D. C. 323, 515 F. 2d 1294 (first case); 169 U. S. App. D. C. 319, 515 F. 2d 1290 (second case).

No. 75–777. NATIONAL LABOR RELATIONS BOARD *v.* ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE & GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION No. 638. C. A. D. C. Cir. Motions of Chamber of Commerce of the United States, Public Service Electric & Gas Co. et al., and Air-Conditioning & Refrigeration Institute et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 172 U. S. App. D. C. 225, 521 F. 2d 885.

No. 75–904. BRUNSWICK CORP. *v.* PUEBLO BOWL-O-MAT, INC., ET AL. C. A. 3d Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Does the mere continued presence in certain local markets of retail establishments allegedly 'acquired' by a 'deep pocket' manufacturer in violation of Section 7 of the Clayton Act afford a basis for competing retailers to recover damages under Section 4 of the Clayton Act when there is no proof that the 'acquisitions' resulted in any lessening of competition or monopoly in those markets?

"2. Does not the 'failing company' principle require dismissal of a treble-damage action based on alleged violations of Section 7 of the Clayton Act where the plaintiffs' entire damage theory is based on the premise that the 'acquired' businesses would have failed and disappeared from the market had the defendant not kept them alive by making the challenged 'acquisitions'?" Reported below: 523 F. 2d 262.

Certiorari Denied. (See also Nos. 75–921, 75–5915, and 75–6015, *supra.*)

No. 75–277. ZEEHANDELAAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 516 F. 2d 897.

No. 75–477. COMBS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 2d 1405.

No. 75–515. ZEEHANDELAAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 585.

No. 75–541. PENNSYLVANIA *v.* MCDADE. Sup. Ct. Pa. Certiorari denied. Reported below: 462 Pa. 414, 341 A. 2d 450.

No. 75–570. DODSON ET AL. *v.* SCHEVE ET AL. Ct. App. D. C. Certiorari denied. Reported below: 339 A. 2d 39.

No. 75–600. JOSEPH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1068.

No. 75–632. POSTELWAITE ET AL. *v.* BECHTOLD, SHERIFF, ET AL. Sup. Ct. App. W. Va. Certiorari denied. Reported below: — W. Va. —, 212 S. E. 2d 69.

No. 75–634. JASINSKI ET AL. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 478.

No. 75–641. BULLOCK *v.* UNITED STATES; and

No. 75–642. KEHOE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 78.

No. 75–650. KRAMER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 521 F. 2d 1073.

No. 75–652. CATERINE *v.* UNITED STATES; and

No. 75–5678. MIKELBERG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 246.

No. 75–658. DIGGS ET AL. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 170 U. S. App. D. C. 320, 516 F. 2d 1248.

No. 75–662. GILMORE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–670. ACCURACY IN MEDIA, INC. *v.* NATIONAL BROADCASTING CO., INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 170 U. S. App. D. C. 173, 516 F. 2d 1101.

No. 75–671. GANIE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1052.

No. 75–689. BURRAFATO ET UX. *v.* UNITED STATES DEPARTMENT OF STATE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 523 F. 2d 554.

No. 75–703. BOWMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–719. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII ET AL. (BOYER ET AL., REAL PARTIES IN INTEREST) *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–726. AETNA FREIGHT LINES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 520 F. 2d 928.

No. 75–731. SUN OIL CO. ET AL. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 177 U. S. App. D. C. 272, 543 F. 2d 757.

No. 75–744. MIDLAND INDEPENDENT SCHOOL DISTRICT ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 60.

No. 75–750. CALVERT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 523 F. 2d 895.

No. 75–751. PACELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 521 F. 2d 135.

No. 75–753. BOYD *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 1, — F. 2d —.

No. 75–754. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–760. AKRON, CANTON & YOUNGSTOWN RAILROAD CO. ET AL. *v.* PACIFIC FRUIT EXPRESS CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 524 F. 2d 1025.

No. 75–762. STANLEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 813.

No. 75–763. ALVARADO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 51[illegible] F. 2d 1133.

No. 75–764. LAFOUNTAIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 520 F. 2d 942.

No. 75–775. SHAPP, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* ZARB, ADMINISTRATOR, FEDERAL ENERGY OFFICE, ET AL. Temp. Emerg. Ct. App. Certiorari denied.

No. 75–778. SCHERER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 523 F. 2d 371.

No. 75–796. HAMLING ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 525 F. 2d 758.

No. 75–798. AMERICAN INSTITUTE OF MERCHANT SHIPPING, LINER COUNCIL *v.* AMERICAN MARITIME ASSN. ET AL.; and

No. 75–800. AMERICAN MARITIME ASSN. *v.* RICHARDSON, SECRETARY OF COMMERCE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 171 U. S. App. D. C. 132, 518 F. 2d 1070.

No. 75–806. MADDEN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 514 F. 2d 1149.

No. 75–809. AFRO-AMERICAN PATROLMEN'S LEAGUE, INC. *v.* CONLISK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 520 F. 2d 1.

No. 75–814. WALLACE ET AL. *v.* KERN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 400.

No. 75–815. ROGERS *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–816. LUCA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1406.

No. 75–824. FELDMAN *v.* AUNSTRUP. C. C. P. A. Certiorari denied. Reported below: 517 F. 2d 1351.

No. 75–825. CAMPBELL *v.* SHAPP, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 521 F. 2d 1398.

No. 75–826. MARTIN *v.* DAYTON SCHOOL DISTRICT NO. 2 ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 85 Wash. 2d 411, 536 P. 2d 169.

No. 75–829. MORGAN *v.* WOOTAN. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 313 So. 2d 621.

No. 75–832. LE CONTÉ COSMETICS, INC., ET AL. *v.* J. B. WILLIAMS CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 523 F. 2d 187.

No. 75–837. ELMORE *v.* NORTH BECKLEY PUBLIC SERVICE DISTRICT. Sup. Ct. App. W. Va. Certiorari denied.

No. 75–838. JAMES TALCOTT, INC. *v.* WHARTON, TRUSTEE. C. A. 2d Cir. Certiorari denied. Reported below: 517 F. 2d 997.

No. 75–840. SHIRLEY *v.* BURNS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 2d 1329.

No. 75–841. INTERNATIONAL TELEPHONE & TELEGRAPH CORP. *v.* FULTON. Ct. App. Mo., St. Louis District. Certiorari denied. Reported below: 528 S. W. 2d 466.

No 75–842. ARRINGTON ET AL. *v.* TAYLOR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 526 F. 2d 587.

No. 75–847. BEFWICK OF PHILADELPHIA, INC. *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO., T/A PUBLIC LEDGER BUILDING. Sup. Ct. Pa. Certiorari denied. Reported below: 463 Pa. 141, 344 A. 2d 465.

No. 75–849. AAFCO HEATING & AIR CONDITIONING CO. *v.* NORTHWEST PUBLICATIONS, INC. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 321 N. E. 2d 580.

No. 75–857. BORING *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 75–872. ADMIRAL CORP. *v.* GILLHAM. C. A. 6th Cir. Certiorari denied. Reported below: 523 F. 2d 102.

No. 75–858. SHANKLIN CORP. *v.* SPRINGFIELD PHOTO MOUNT CO. C. A. 1st Cir. Certiorari denied. Reported below: 521 F. 2d 609.

No. 75–861. BANCROFT MANUFACTURING CO., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 436.

No. 75–862. INGRAM *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 134 Ga. App. 935, 216 S. E. 2d 608.

No. 75–868. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA *v.* DAWES. C. A. 8th Cir. Certiorari denied. Reported below: 522 F. 2d 380.

No. 75–880. ABELES *v.* ELROD, SHERIFF. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 27 Ill. App. 3d 155, 326 N. E. 2d 443.

No. 75–882. SPLAWN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–883. WEINTRAUB *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–885. DIAMOND INTERNATIONAL CORP. *v.* MARYLAND FRESH EGGS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 523 F. 2d 113.

No. 75–886. FORMAN *v.* MASSACHUSETTS CASUALTY INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 425.

No. 75–888. CAMP ET AL. *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 523 F. 2d 935.

No. 75–889. CARBONA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 27 Ill. App. 3d 988, 327 N. E. 2d 546.

No. 75–892. WINSLOW ET AL. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 26 Ill. App. 3d 1035, 325 N. E. 2d 426.

No. 75–895. CONTROLLED SANITATION CORP. *v.* DISTRICT 128, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 524 F. 2d 1324.

No. 75–900. MINNESOTA GAS CO. *v.* PUBLIC SERVICE COMMISSION, DEPARTMENT OF PUBLIC SERVICE OF MINNESOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 523 F. 2d 581.

No. 75–907. BRAMBLETT *v.* LEE. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 320 N. E. 2d 778.

No. 75–918. ATCHLEY *v.* GREENHILL, CHIEF JUSTICE, SUPREME COURT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 692.

No. 75–931. BROOKSHIRE BROS., INC., ET AL. *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 93.

No. 75–935. MANHATTAN CONSTRUCTION CO. *v.* McDOWELL-PURCELL, INC. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1181.

No. 75–936. FRANKOVIGLIA *v.* CAMP ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 525 F. 2d 690.

No. 75–937. WILLMAR POULTRY CO. ET AL. *v.* MORTON-NORWICH PRODUCTS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 520 F. 2d 289.

No. 75–938. HIGHTOWER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 75–945. GARZA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 527 S. W. 2d 316.

No 75–953. HOWELL *v.* JONES, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 53.

No. 74–954. HARRON *v.* UNITED HOSPITAL CENTER, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 522 F. 2d 1133.

No. 75–955. UNARCO INDUSTRIES, INC., ET AL. *v.* SOUTHERN PACIFIC TRANSPORTATION CO. C. A. 9th Cir. Certiorari denied.

No. 75–992. MARTINEZ *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied.

No. 75–5129. STEWART *v.* GRIFFIN. C. A. 5th Cir. Certiorari denied.

No. 75–5437. AMEZQUITA ET AL. *v.* COLON, GOVERNOR OF PUERTO RICO, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 518 F. 2d 8.

No. 75–5464. ALEXANDER *v.* BUCKLEY ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–5508. VALENZUELA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 521 F. 2d 414.

No. 75–5514. MALINOWSKI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 75–5585. JEFFERSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 75–5679. DELLAMURA *v.* UNITED STATES; and

No. 75–5690. MILLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1052.

No. 75–5609. HUSTON *v.* CALIFORNIA; and
No. 75–6029. GARVAS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 75–5640. YOUNG ET AL. *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 75–5656. ANDRADE ET AL. *v.* HAUCK, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 322.

No. 75–5663. BERTRAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 75–5674. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1028.

No. 75–5682. GEREAU ET AL. *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 140.

No. 75–5686. BAXTER *v.* TEXAS. Ct. Civ. App. Tex., 7th Sup. Jud. Dist. Certiorari denied. Reported below: 525 S. W. 2d 543.

No. 75–5689. RAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 75–5699. OSBORNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 1402.

No. 75–5710. PHILLIPS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 75–5711. WARREN *v.* LEVI, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Certiorari denied.

No. 75–5712. BEDFORD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 519 F. 2d 650.

No. 75–5713. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5714. LLEWELLYN *v.* NEW YORK TELEPHONE CO. ET AL. Ct. App. N. Y. Certiorari denied.

No. 75–5716. ARCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 812.

No. 75–5717. SWINTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 521 F. 2d 1255.

No. 75–5720. BRONSTEIN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 521 F. 2d 459.

No. 75–5722. BELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 521 F. 2d 713.

No. 75–5731. BEALS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1406.

No. 75–5735. HARRELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5739. SPICER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5740. ROLLINS, AKA EVANS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 522 F. 2d 160.

No. 75–5743. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1406.

No. 75–5747. ZIMMERMAN *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1400.

No. 75–5746. VICARI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1052.

No. 75–5748. MARKOWITZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 520 F. 2d 1327.

No. 75–5749. CARPENTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5752. LIPSCOMB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 75–5756. KIPERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5757. ZAPATA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 695.

No. 75–5758. SHIVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 813.

No. 75–5759. NICHOLSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5763. DILLARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5764. WILLIAMS *v.* PUTNAM, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 75–5767. ALTENDORF ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 521 F. 2d 1403.

No. 75–5769. ADAMS *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–5771. MCCANTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 2d 1405.

No. 75–5772. KIENLEN *v.* WARDEN, LEAVENWORTH PENITENTIARY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 75–5774. LITTLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 524 F. 2d 335.

No. 75–5776. KNIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1052.

No. 75–5779. CONLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 523 F. 2d 650.

No. 75–5780. MOORE *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 318 So. 2d 577.

No. 75–5781. FREEMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 524 F. 2d 337.

No. 75–5782. WALLACE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1407.

No. 75–5785. CANNON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5786. BIG CROW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 523 F. 2d 955.

No. 75–5787. SHAFFNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 524 F. 2d 1021.

No. 75–5788. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 525 F. 2d 999.

No. 75–5790. LANG ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5794. TAYLOR *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 112 Ariz. 68, 537 P. 2d 938.

No. 75–5795. HORVATH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5796. HAWTHORNE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5801. LUCAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5803. SULLIVAN *v.* DAGGETT, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 75–5810. STOKES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5813. BARONE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 696.

No. 75–5815. POTERE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 525 F. 2d 27.

No. 75–5818. ROSEMAN *v.* INDIANA UNIVERSITY OF PENNSYLVANIA AT INDIANA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 520 F. 2d 1364.

No. 75–5825. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 319.

No. 75–5826. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1052.

No. 75–5830. HEBNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5832. GORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5833. BROWNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5835. MUNIZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1406.

No. 75–5836. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5837. BORUSKI *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 75–5838. LOFTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1406.

No. 75–5839. WATSON *v.* UNITED STATES; and
No. 75–5869. CHATMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5841. RANNEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 524 F. 2d 830.

No. 75–5845. WIDENER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5847. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 2d 647.

No. 75–5848. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1054.

No. 75–5850. PETROFSKY *v.* RITTER, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. C. A. 10th Cir. Certiorari denied.

No. 75–5851. VANDERPOOL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 75–5854. BOGGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 238.

No. 75–5855. WEATHERSPOON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 75–5866. PITTMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 527 F. 2d 444.

No. 75–5871. HENDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5880. JONAS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 169 Conn. 566, 363 A. 2d 1378.

No. 75–5886. BOYLAND *v.* SMITH, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 75–5890. ABRAMS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 75–5893. TAFT *v.* HOPPER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 75–5894. ROUNDTREE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 527 F. 2d 16.

No. 75–5896. BUFORD *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 524 F. 2d 147.

No. 75–5900. HENDRY *v.* INDUSTRIAL COMMISSION OF ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 112 Ariz. 108, 538 P. 2d 382.

No. 75–5905. FRAZIER ET AL. *v.* DONELON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 520 F. 2d 941.

No. 75–5906. SHERRILL *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 524 F. 2d 186.

No. 75–5903. HILLIARD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 75–5910. MALONE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 75–5911. HOHENSEE ET AL. *v.* FENNELL. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 898.

No. 75–5913. GIBBS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 235 Ga. 480, 220 S. E. 2d 254.

No. 75–5914. MINTZER *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 585.

No. 75–5918. WEHRINGER *v.* ALLEN-STEVENSON SCHOOL ET AL. Ct. App. N. Y. Certiorari denied.

No. 75–5919. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5920. BLACK *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 75–5921. CHAMBRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1406.

No. 75–5923. THOMAS *v.* SAVAGE, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 536.

No. 75–5933. LARA *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1087.

No. 75–5953. WAGNER *v.* JUVENILE DEPARTMENT OF MULTNOMAH COUNTY. Ct. App. Ore. Certiorari denied. Reported below: 21 Ore. App. 396, 535 P. 2d 102.

No. 75–5925. BOAG *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 75–5939. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 524 F. 2d 167.

No. 75–5941. FLYNN *v.* O'MARA, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–5961. MILLER ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: See 27 Ill. App. 3d 788, 327 N. E. 2d 253.

No. 75–5964. MITCHELL *v.* ALBERTSON'S FOOD CENTER, INC. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 75–5965. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 29 Ill. App. 3d 519, 331 N. E. 2d 99.

No. 75–5968. DELGADO *v.* ROBINSON, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 586.

No. 75–5971. MASON *v.* AUTOMOTIVE HOBBY SHOPS. C. A. 7th Cir. Certiorari denied. Reported below: 521 F. 2d 1403.

No. 75–5973. FOREHAND *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 235 Ga. 295, 219 S. E. 2d 378.

No. 75–5975. COZZETTI *v.* CENTRAL TELEPHONE CO. ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–5981. NICKENS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 75–5988. ALVAREZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–5974. KRAMER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 15 Cal. 3d 419, 541 P. 2d 296.

No. 75–5989. NACHBAUR *v.* ARGO INSTRUMENTS, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 75–5991. MOORE *v.* SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 75–5996. ANDERSON *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: See —— Mass. App. ——, 334 N. E. 2d 61.

No. 75–5998. WORTON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1231.

No. 75–6005. CAMPBELL *v.* DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 463 Pa. 472, 345 A. 2d 616.

No. 75–6008. DAWN, DBA GAME CO. *v.* STERLING DRUG, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–6011. ROMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 75–6012. SMITH *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Alameda. Certiorari denied.

No. 75–6022. CARVAJAL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 529 S. W. 2d 517.

No. 75–6023. BOWIE *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 75–6025. WEST *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–6027. JONES *v.* MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 75–6028. BECKER *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 75–6053. JEFFERSON *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1053.

No. 75–6100. CHAPMAN *v.* WESTERN LIFE INSURANCE CO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 31 Ill. App. 3d 368, 334 N. E. 2d 806.

No. 75–6107. JOHNSON *v.* DEPARTMENT OF WATER & POWER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–243. INTERNATIONAL HARVESTER CO *v.* ANDERSON ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 510 F. 2d 976.

No. 75–593. POLISH AMERICAN CONGRESS ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 520 F. 2d 1248.

No. 75–610. CITY OF HIGHLAND PARK, ILLINOIS, ET AL. *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 519 F. 2d 681.

No. 75–659. LAWSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 521 F. 2d 1403.

No. 75–780. CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO *v.* NUSSBACHER. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 518 F. 2d 873.

No. 75–866. M. J. D. M. TRUCK RENTALS, INC., ET AL. *v.* O'BRIEN; and

No. 75–887. ANASTOS ET AL. *v.* M. J. D. M. TRUCK RENTALS, INC., ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: 521 F. 2d 1301.

No. 75–890. GULF & WESTERN INDUSTRIES, INC. *v.* ALLIS-CHALMERS MANUFACTURING CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 527 F. 2d 335.

No. 75–891. ANASTASIA ET AL. *v.* COSMOPOLITAN NATIONAL BANK OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 527 F. 2d 150.

No. 75–5616. STOCK *v.* SIELAFF, CORRECTIONS DIRECTOR. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 521 F. 2d 1403.

No. 75–5709. SCHARF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 521 F. 2d 1403.

No. 75–638. TRAINOR, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* WILSON. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma*

pauperis granted. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion and petition. Reported below: 519 F. 2d 1406.

No. 75–566. DANLEY, AKA CARDWELL, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 523 F. 2d 369.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted in the United States District Court for the District of Oregon of use of the mails to ship obscene materials in violation of 18 U. S. C. § 1461, of interstate transportation of obscene materials in violation of 18 U. S. C. § 1462, and of interstate transportation of obscene materials for purposes of distribution and sale in violation of 18 U. S. C. § 1465. The Court of Appeals for the Ninth Circuit affirmed. 523 F. 2d 369 (1975).

Title 18 U. S. C. § 1461 provides in pertinent part:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . .
>
> . . . . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years . . . ."

Title 18 U. S. C. § 1462 provides in pertinent part:

> "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other com-

mon carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .

. . . . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

Title 18 U. S. C. § 1465 provides in pertinent part:

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to §§ 1461 and 1465, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and,

since the judgment of the Court of Appeals for the Ninth Circuit was rendered after *Orito*, reverse.

I also note that in *Hamling* v. *United States*, 418 U. S. 87 (1974), this Court held that federal obscenity prosecutions did not require proof of a uniform national standard of obscenity and that a juror sitting on a federal obscenity case was permitted to draw on the knowledge of the community from which he came "in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." *Id.*, at 105. Here, however, the State of Oregon, at the time of petitioners' trial, had no policy prohibiting the distribution of obscene materials, unless minors were involved. This case, therefore, raises the important question whether a uniform national standard should be applied in this circumstance. Decision of that question certainly merits plenary consideration and oral argument.

In these circumstances, I have no occasion to consider whether the other question presented by petitioners merits plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 75–707. SANDERS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 234 Ga. 586, 216 S. E. 2d 838.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the Criminal Court of Fulton County, Ga., on two counts of exhibiting obscene materials in violation of Ga. Code Ann. § 26–2101 (1972) (now superseded by Ga. Acts 1975, p. 498). The convictions were based upon two exhibitions of a motion picture film entitled "Deep Throat." Section 26–2101 (a) provides in pertinent part:

> "A person commits the offense of distributing obscene materials when he . . . exhibits or other-

> wise disseminates to any person any obscene material of any description, knowing the obscene nature thereof . . . ."

Under § 26–2101 (b):

> "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters . . . ."

The judgment of conviction was ultimately affirmed by the Georgia Supreme Court, 234 Ga. 586, 216 S. E. 2d 838 (1975).

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 26–2101 (a), as it incorporates the definition of obscene material in § 26–2101 (b), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari and, since the judgment of the Georgia Supreme Court was rendered after *Miller,* reverse. In that circumstance, I have no occasion to consider whether the other question presented by petitioner merits plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States*, 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 75–735. PANDILIDIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 524 F. 2d 644.

No. 75–737. ARKANSAS LOUISIANA GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 170 U. S. App. D. C. 393, 517 F. 2d 1223.

No. 75–769. BUREAU OF REVENUE OF NEW MEXICO *v.* Fox. Sup. Ct. N. M. Certiorari denied for failure to file petition within the time provided by 28 U. S. C. § 2101 (c). Reported below: See 87 N. M. 261, 531 P. 2d 1234.

No. 75–884. RIPON SOCIETY, INC., ET AL. *v.* NATIONAL REPUBLICAN PARTY ET AL.; and

No. 75–991. NATIONAL REPUBLICAN PARTY ET AL. *v.* RIPON SOCIETY, INC., ET AL. C. A. D. C. Cir. Motion of Senator Edward W. Brooke et al. for leave to file a brief as *amici curiae* in No. 75–884 granted. Certiorari denied. Reported below: 173 U. S. App. D. C. 350, 525 F. 2d 567.

No. 75–845. PENNSYLVANIA *v.* McCUTCHEN. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied, it appearing that the judgment below rests on adequate state grounds. Reported below: 463 Pa. 90, 343 A. 2d 669.

No. 75–851. BOMBARD, CORRECTIONAL SUPERINTENDENT *v.* WASHINGTON. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 525 F. 2d 262.

No. 75–854. TRANS WORLD AIRLINES, INC. *v.* HUGHES TOOL CO. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 515 F. 2d. 173.

No. 75–893. SULMEYER ET AL., TRUSTEES IN BANKRUPTCY *v.* COCA COLA CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 515 F. 2d 835.

No. 75–899. UNIVERSITY OF DELAWARE *v.* KEEGAN ET AL. Sup. Ct. Del. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN would grant certiorari. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 349 A. 2d 14.

No. 75–923. CONSTRUCTION INDUSTRY ASSOCIATION OF SONOMA COUNTY ET AL. *v.* CITY OF PETALUMA ET AL. C. A. 9th Cir. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 522 F. 2d 897.

No. 75–5626. LIPSCOMB *v.* UNITED STATES. C. A. 6th Cir. Certiorari and other relief denied. Reported below: 524 F. 2d 1406.

No. 75–930. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA ET AL. *v.* EAZOR EXPRESS, INC., ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 520 F. 2d 951.

Rehearing Denied

No. 75–646. A/S ARCADIA *v.* GULF INSURANCE CO., 423 U. S. 1053;

No. 75–5380. LADD *v.* CALIFORNIA ET AL., 423 U. S. 1057;

No. 75–5529. TYLER *v.* WANGELIN, U. S. DISTRICT JUDGE, 423 U. S. 1086;

No. 75–5932. HARPER *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT, 423 U. S. 1072; and

No. 75–5990. LIPSMAN *v.* GIARDINO, 423 U. S. 1092. Petitions for rehearing denied.

No. 74–1396. MICHELIN TIRE CORP. *v.* WAGES, TAX COMMISSIONER, 423 U. S. 276;

No. 75–392. BURCH *v.* UNITED STATES, 423 U. S. 1032;

No. 75–5578. SMITH *v.* CALIFORNIA, 423 U. S. 1023;

No. 75–5602. TAYLOR *v.* UNITED STATES ET AL., 423 U. S. 1035; and

No. 75–5636. SMITH *v.* CALIFORNIA, 423 U. S. 1024. Petitions for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions.

No. 75–5110. CLARK *v.* CAMPBELL, JUDGE, 423 U. S. 948;

No. 75–5221. STURGEON *v.* DOUGLAS, 423 U. S. 934; and

No. 75–5411. JOHNSON *v.* UNITED STATES, 423 U. S. 1020. Motions for leave to file petitions for rehearing

denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 72–1448. HOWELL *v.* JONES, SHERIFF, 414 U. S. 803 and 1052. Motion for leave to file second petition for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

FEBRUARY 26, 1976

Dismissal Under Rule 60

No. 75–1085. INFORMATION DYNAMICS, LTD. *v.* GREENWAY ET UX. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 524 F. 2d 1145.

FEBRUARY 27, 1976

Miscellaneous Order

No. 75–436. BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE UNITED STATES SENATE, ET AL.; and

No. 75–437. BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE UNITED STATES SENATE, ET AL., *ante*, p. 1. Motion of appellees Center for Public Financing of Elections et al. to extend stay heretofore entered by this Court on January 30, 1976 [*ante*, at 144], is hereby granted, but for a period of 20 days, to and including the close of business day of March 22, 1976. MR. JUSTICE BLACKMUN would deny the motion. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

MARCH 1, 1976

Appeal Dismissed

No. 75–966. FLANNERY *v.* CITY OF NORFOLK. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. Reported below: 216 Va. 362, 218 S. E. 2d 730.

Certiorari Granted—Reversed. (See No. 75–5366, *ante*, p. 382.)

Miscellaneous Orders

No A–623. ROBERGE *v.* HOQUIAM SCHOOL DISTRICT No. 28 ET AL. C. A. 9th Cir. Application for extension of time within which to file petition for writ of certiorari, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. A–722. JONES *v.* HALL, CORRECTION COMMISSIONER, ET AL. Application for writ of habeas corpus, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–729. ESCALANTE ET AL. *v.* BRISCOE, GOVERNOR OF TEXAS, ET AL. Application for stay of judgment of the United States District Court for the Western District of Texas and for an order to extend filing deadline for candidacy for state representative to the Texas State Legislature, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied. Reported below: 408 F. Supp. 1050.

No. D–51. IN RE DISBARMENT OF WHITAKER. It having been reported to the Court that Halbert E. Whitaker, of Cleveland, Ohio, has been suspended indefinitely from the practice of law by the Supreme Court of Ohio, and this Court by order of October 6, 1975 [423 U. S. 811], having suspended the said Halbert E. Whitaker from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a response has expired;

It is ordered that the said Halbert E. Whitaker be

disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–50. IN RE DISBARMENT OF RUBIN. It having been reported to the Court that Franklin D. Rubin, of Philadelphia, Pa., has been disbarred from the practice of law by the Supreme Court of Pennsylvania, Eastern District, and this Court by order of October 6, 1975 [423 U. S. 811], having suspended the said Franklin D. Rubin from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a response has expired;

It is ordered that the said Franklin D. Rubin be disbarred from the practice of law in this Court and that his name be stricken from the role of attorneys admitted to practice before the Bar of this Court.

No. D–52. IN RE DISBARMENT OF SHAFFER. It having been reported to the Court that Gerald L. Shaffer, of Fort Dodge, Iowa, has had his license to practice law revoked by the Supreme Court of Iowa, and this Court by order of October 6, 1975 [423 U. S. 812], having suspended the said Gerald L. Shaffer from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a response has expired;

It is ordered that the said Gerald L. Shaffer be disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–53. In re Disbarment of Golden. It having been reported to the Court that Roy Aaron Golden, of Des Moines, Iowa, has had his license to practice law revoked by the Supreme Court of Iowa, and this Court by order of October 6, 1975 [423 U. S. 812], having suspended the said Roy Aaron Golden from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a response has expired;

It is ordered that the said Roy Aaron Golden be disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–56. In re Disbarment of Demopoulos. It having been reported to the Court that James George Demopoulos, of Chicago, Ill., has resigned from the practice of law in the Supreme Court of Illinois, and this Court by order of October 6, 1975 [423 U. S. 812], having suspended the said James George Demopoulos from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a response has expired;

It is ordered that the said James George Demopoulos be disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–57. In re Disbarment of Parsons. It having been reported to the Court that Russell Edward Parsons, of Santa Ana, Cal., has resigned from the prac-

tice of law in the Supreme Court of California, and this Court by order of October 14, 1975 [423 U. S. 888], having suspended the said Russell Edward Parsons from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a response has expired;

It is ordered that the said Russell Edward Parsons be disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 74–175. MIDDENDORF, SECRETARY OF THE NAVY, ET AL. *v.* HENRY ET AL.; and

No. 74–5176. HENRY ET AL. *v.* MIDDENDORF, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. [Restored to calendar, 421 U. S. 906.] Motion for leave to file memorandum after argument granted. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 74–1492. WASHINGTON, MAYOR OF WASHINGTON, D. C., ET AL. *v.* DAVIS ET AL. C. A. D. C. Cir. [Certiorari granted, 423 U. S. 820.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Both petitioners and private respondents allotted seven and one-half additional minutes for oral argument.

No. 74–1542. UNION ELECTRIC CO. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 8th Cir. [Certiorari granted, 423 U. S. 821.] Motion of respondents John C. Danforth, Attorney General of Missouri, et al., for leave to file a brief after argument granted.

No. 74–1263. BREWER, WARDEN *v.* WILLIAMS. C. A. 8th Cir. [Certiorari granted, 423 U. S. 1031.] Motion of petitioner for additional time for oral argument denied, but alternative request for divided argument granted.

No. 74–6257. GREGG *v.* GEORGIA. Sup. Ct. Ga. [Certiorari granted, 423 U. S. 1082.] Motion of petitioner for appointment of counsel granted, and it is ordered that G. Hughel Harrison, Esquire, of Lawrenceville, Ga., is appointed to serve as counsel for petitioner in this case.

No. 75–62. RUNYON ET UX., DBA BOBBE'S SCHOOL *v.* MCCRARY ET AL.;

No. 75–66. FAIRFAX-BREWSTER SCHOOL, INC. *v.* GONZALES ET AL.;

No. 75–278. SOUTHERN INDEPENDENT SCHOOL ASSN. *v.* MCCRARY ET AL.; and

No. 75–306. MCCRARY ET AL. *v.* RUNYON ET UX., DBA BOBBE'S SCHOOL, ET AL. C. A. 4th Cir. [Certiorari granted, 423 U. S. 945.] Motion of Dade Christian Schools, Inc., for leave to present oral argument as *amicus curiae* denied.

No. 75–6058. WILLIAMS *v.* PHILLIPS ET AL., U. S. CIRCUIT JUDGES. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 75–946. CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8 ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS COMMISSION ET AL. Appeal from Sup. Ct. Wis. Probable jurisdiction noted. Reported below: 69 Wis. 2d 200, 231 N. W. 2d 206.

Certiorari Granted

No. 75–503. COOK ET AL. *v.* HUDSON ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 511 F. 2d 744.

No. 75–708. MARKS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. Reported below: 520 F. 2d 913.

No. 75–906. WALSH, DBA TOM WALSH & CO. *v.* SCHLECHT ET AL., TRUSTEES. Sup. Ct. Ore. Certiorari granted. Reported below: 273 Ore. 221, 540 P. 2d 1011.

No. 74–6632. MOODY *v.* DAGGETT, WARDEN. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted.

No. 75–478. PARKER SEAL CO. *v.* CUMMINS. C. A. 6th Cir. Motion of Trans World Airlines, Inc., for leave to file a brief as *amicus curiae* and certiorari granted. Reported below: 516 F. 2d 544.

Certiorari Denied

No. 75–684. PACIFIC MARITIME ASSN. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 169 U. S. App. D. C. 301, 515 F. 2d 1018.

No. 75–693. GENERAL FOODS CORP. *v.* GREENE, DBA WILLIAM E. GREENE FOOD DISTRIBUTORS. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 635.

No. 75–725. LAGANA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 48 App. Div. 2d 870, 372 N. Y. S. 2d 566.

No. 75–797. ASHTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 521 F. 2d 1399.

No. 75–819. SCHWARTZBAUM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 527 F. 2d 249.

No. 75–820. CAMIL, CITY ATTORNEY OF DUARTE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (BUENA VISTA CINEMA ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–830. BROOKSIDE CORP., INC. *v.* INTERNATIONAL HARVESTER CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 762.

No. 75–860. WARNER PRESS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 190.

No. 75–916. MEIER *v.* KELLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 521 F. 2d 548.

No. 75–932. CITY OF GLENDALE *v.* GLENDALE CITY EMPLOYEES ASSN., INC., ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 15 Cal. 3d 328, 540 P. 2d 609.

No. 75–943. INTERNATIONAL AIR INDUSTRIES, INC., ET AL. *v.* AMERICAN EXCELSIOR CO. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 714.

No. 75–944. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 29 Ill. App. 3d 644, 331 N. E. 2d 4.

No. 75–971. SIMPSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 75–979. ADKINS, ADMINISTRATRIX *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 54 Ill. 2d 511, 301 N. E. 2d 729.

No. 75–987. KESTENBAUM *v.* FALSTAFF BREWING CORP. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 690.

No. 75–1010. SCHOONOVER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 218 Kan. 377, 543 P. 2d 881.

No. 75–5649. BRADLEY *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 812.

No. 75–5652. RANSOM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 885.

No. 75–5693. GRAYSON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 75–5733. HARSTEN ET UX. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 75–5744. MUMIT, AKA ROLLE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 49 App. Div. 2d 523, 370 N. Y. S. 2d 104.

No. 75–5762 GRIFFIN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 75–5809. HORSLEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1264.

No. 75–5843. RHINEHART *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 75–5853. GRICE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5858. GHIZ *v.* BORDENKIRCHER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 519 F. 2d 759.

No. 75–5875. BUTTS *v.* CITY OF CINCINNATI. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 75–5868. HERNANDEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1054.

No. 75–5879. GRIFFIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 525 F. 2d 710.

No. 75–5882. HOWERY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 524 F. 2d 1404.

No. 75–5883. ROSS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 527 F. 2d 984.

No. 75–5884. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 524 F. 2d 595.

No. 75–5888. STRATTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1052.

No. 75–5889. QUALLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 75–5891. DIXON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1052.

No. 75–5892. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 524 F. 2d 1404.

No. 75–5917. OSBORNE, AKA PAYNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5938. NICHOLSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1406.

No. 75–6038. QUATSLING *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 24 Ariz. App. 105, 536 P. 2d 226.

No. 75–5944. ALLISON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 75–6030. MORGAN *v.* REES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 75–6040. GORDY *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 691.

No. 75–6041. BRUCE *v.* COWAN, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1405.

No. 75–6043. STEBBINS *v.* NATIONWIDE MUTUAL INSURANCE CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 528 F. 2d 934.

No. 75–6048. HICKS *v.* UNITED STATES; and
No. 75–6050. BARNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1001.

No. 75–6051. GIESE *v.* HOLT, RINEHART & WINSTON, INC., ET AL. C. A. 6th Cir. Certiorari denied.

No. 75–6052. CROUCH *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1405.

No. 75–6054. NUCCIO *v.* MEYER, CORRECTIONAL SUPERINTENDENT. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 695.

No. 75–6056. BONNER *v.* CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 526 F. 2d 1331.

No. 75–6060. SIMPSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 75–6061. MERLINO *v.* HALL, CORRECTION COMMISSIONER, ET AL. C. A. 1st Cir. Certiorari denied.

No. 75–6063. WALLACE *v.* LUCEY, GOVERNOR OF WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 526 F. 2d 592.

No. 75–6064. CHASE *v.* CRISP, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 523 F. 2d 595.

No. 75–6066. COBBS *v.* ROBINSON, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 76–6127. FULTON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 234 Pa. Super. 745, 342 A. 2d 420.

No. 75–608. COUGHLIN ET AL. *v.* STACHULAK. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion and petition. Reported below: 520 F. 2d 931.

MR. JUSTICE WHITE, with whom MR. JUSTICE POWELL joins, dissenting.

On appeal from an order granting respondent a writ of habeas corpus, 369 F. Supp. 628 (ND Ill. 1973), the Court of Appeals held, *United States ex rel. Stachulak* v. *Coughlin*, 520 F. 2d 931 (CA7 1975), that the Due Process Clause of the Fourteenth Amendment requires that the reasonable-doubt standard of proof be applied in judicial proceedings under the Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat., c. 38, § 105–1.01 *et seq.* (1973), which authorizes the State to seek involuntary indeterminate commitment to a correctional institution in lieu of criminal prosecution of a person charged

with a criminal offense and believed to be sexually dangerous within the meaning of the Act.

The question whether due process requires proof beyond a reasonable doubt in such proceedings has produced divergent conclusions in the Courts of Appeals. Compare *Tippett* v. *Maryland*, 436 F. 2d 1153 (CA4 1971), cert. dismissed *sub nom. Murel* v. *Baltimore City Criminal Court*, 407 U. S. 355 (1972) (proof by a preponderance of the evidence), with *In re Ballay*, 157 U. S. App. D. C. 59, 482 F. 2d 648 (1973), and *United States ex rel. Stachulak* v. *Coughlin*, *supra* (proof beyond a reasonable doubt).* The question is important to the administration of justice in this country, and the Court should shoulder its responsibility to resolve the conflicting judgments.

I would grant the petition for a writ of certiorari and afford the case plenary consideration.

No. 75–682. Colorado Civil Rights Commission et al. *v.* Colorado Springs Coach Co. et al. Ct. App. Colo. Motion of International Association of Official Human Rights Agencies for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 35 Colo. App. 378, 536 P. 2d 837.

No. 75–759. Taylor et ux. *v.* St. Vincent's Hospital. C. A. 9th Cir. Certiorari denied. Reported below: 523 F. 2d 75.

Mr. Justice White, with whom The Chief Justice joins, dissenting.

Once again, see *Greco* v. *Orange County Memorial Hospital*, 423 U. S. 1000 (1975) (White, J., dissent-

*Several state courts are also at odds with the Court of Appeals for the Fourth Circuit. See, *e. g.*, *People* v. *Pembrock*, 62 Ill. 2d 317, 342 N. E. 2d 28 (1976); *People* v. *Burnick*, 14 Cal. 3d 306, 535 P. 2d 352 (1975); *In re Andrews*, — Mass. —, 334 N. E. 2d 15 (1975); *In re Levias*, 83 Wash. 2d 253, 517 P. 2d 588 (1973).

ing), this Court leaves standing a square conflict on an important point of federal law. The Court of Appeals for the Ninth Circuit held in the instant case that the receipt by the respondent hospital of federal funds under the Hill-Burton Act, 78 Stat. 447, 42 U. S. C. § 291 *et seq.*, does not render the hospital an instrumentality of the Government so that its actions are governed by constitutional requirements applicable to the States or the Federal Government. The court's holding is consistent with the law in three other Circuits, *Doe* v. *Bellin Memorial Hospital*, 479 F. 2d 756 (CA7 1973); *Ward* v. *St. Anthony Hospital*, 476 F. 2d 671 (CA10 1973); *Jackson* v. *Norton-Children's Hospitals, Inc.*, 487 F. 2d 502 (CA6 1973), but squarely in conflict with the rule in the Fourth Circuit. *Doe* v. *Charleston Area Medical Center*, 529 F. 2d 638 (1975); *Christhilf* v. *Annapolis Emergency Hospital Assn., Inc.*, 496 F. 2d 174 (1974); *Sams* v. *Ohio Valley General Hospital Assn.*, 413 F. 2d 826 (1969); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (1963).

The consequence is that hospitals receiving Hill-Burton funds in the Fourth Circuit are subject to very different rules as a matter of federal law than are similar hospitals in at least four other Circuits. This Court should not, consistent with a responsible exercise of its certiorari jurisdiction, permit such conflicts on important points of federal law to remain unresolved.

No. 75–807. WIGODA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 521 F. 2d 1221.

No. 75–986. COLLINS ET UX. *v.* RIDGE TOOL CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 520 F. 2d 591.

No. 75–958. GARRISON, WARDEN, ET AL. *v.* EDWARDS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 529 F. 2d 1374.

No. 75–975. GOVERNMENT OF INDIA *v.* PFIZER, INC., ET AL.; and

No. 75–976. IMPERIAL GOVERNMENT OF IRAN *v.* PFIZER, INC., ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions. Reported below: 522 F. 2d 612.

Rehearing Denied

No. 75–538. GRANCICH ET AL. *v.* UNITED STATES, 423 U. S. 1050;

No. 75–666. COFFEE-RICH, INC., ET AL. *v.* FIELDER, DIRECTOR OF AGRICULTURE OF CALIFORNIA, ET AL., 423 U. S. 1042;

No. 75–714. HEILIG *v.* CHRISTENSEN, JUDGE, ET AL., 423 U. S. 1055;

No. 75–5581. WARREN *v.* UNITED STATES, 423 U. S. 1074;

No. 75–5685. TOLBERT ET AL. *v.* CALIFORNIA, 423 U. S. 1060;

No. 75–5732. CARTER *v.* UNITED STATES, 423 U. S. 1076; and

No. 75–5753. HOLDING *v.* HOLDING, 423 U. S. 1062. Petitions for rehearing denied.

MARCH 8, 1976

Affirmed on Appeal

No. 75–1004. JIMENEZ ET AL. *v.* HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 2 ET AL. Affirmed on appeal from D. C. S. D. Tex. MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument.

Certiorari Granted—Vacated and Remanded

No. 74–205. MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WILLIAMS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Mathews* v. *Eldridge, ante,* p. 319. MR. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 494 F. 2d 1191.

Miscellaneous Orders

No. A–719.* ENOMOTO, CORRECTIONS DIRECTOR, ET AL. *v.* SPAIN ET AL. It is ordered that the application for stay of judgment of the United States District Court for the Northern District of California, dated January 14, 1976, as amended by its order of February 9, 1976, is granted but limited to Items 1, 2, and 4 of said judgment, pending [final disposition of applicants' appeal from said judgment to the Court of Appeals for the Ninth Circuit]. Reported below: 408 F. Supp. 534.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Since I am not persuaded that the applicants have demonstrated a sufficient threat of irreparable injury to justify the exercise of this Court's power to issue a stay, I would deny the application.

No. D–54. IN RE DISBARMENT OF WOLFF. It having been reported to the Court that Jerome B. Wolff, of Stevenson, Md., has been disbarred by the Court of Appeals of Maryland, and this Court by order of October 6, 1975 [423 U. S. 812], having suspended the said Jerome

*[The Court issued this order in amended form on March 11, 1976, having substituted the bracketed phrase for "further order of the Court." See *post,* p. 959.]

B. Wolff from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon respondent and that the time within which to file a response has expired;

It is ordered that the said Jerome B. Wolff be disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 75–6257. GREGG *v.* GEORGIA. Sup. Ct. Ga.;

No. 75–5394. JUREK *v.* TEXAS. Ct. Crim. App. Tex.;

No. 75–5491. WOODSON ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C.;

No. 75–5706. PROFFITT *v.* FLORIDA. Sup. Ct. Fla.; and

No. 75–5844. ROBERTS *v.* LOUISIANA. Sup. Ct. Ala. [Certiorari granted, 423 U. S. 1082.] Motion of Amnesty International for leave to file a brief as *amicus curiae* granted.

No. 75–73. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. *v.* BAIRD ET AL.; and

No. 75–109. HUNERWADEL *v.* BAIRD ET AL. Appeals from D. C. Mass. [Probable jurisdiction noted, 423 U. S. 982.] Motion of Thomas P. McMahon, Esquire, to permit Brian A. Riley, Esquire, to argue *pro hac vice* on behalf of appellant in No. 75–109 granted.

No. 75–260. MCDONALD ET AL. *v.* SANTA FE TRAIL TRANSPORTATION CO. ET AL. C. A. 5th Cir. [Certiorari granted, 423 U. S. 923.] Motion of petitioners for additional time for oral argument denied. Alternative request to cede 10 minutes of allotted time for oral argument to the Solicitor General as *amicus curiae* granted.

No. 75–251. FITZPATRICK ET AL. *v.* BITZER, CHAIRMAN, STATE EMPLOYEES' RETIREMENT COMMISSION, ET AL.; and

No. 75–283. BITZER, CHAIRMAN, STATE EMPLOYEES' RETIREMENT COMMISSION, ET AL. *v.* MATTHEWS ET AL. C. A. 2d Cir. [Certiorari granted, 423 U. S. 1031.] Motion of the Solicitor General to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose.

No. 75–491. UNITED STATES *v.* AGURS. C. A. D. C. Cir. [Certiorari granted, 423 U. S. 983.] Motion of respondent to dismiss writ as improvidently granted denied.

No. 75–552. KLEPPE, SECRETARY OF THE INTERIOR, ET AL. *v.* SIERRA CLUB ET AL.; and

No. 75–561. AMERICAN ELECTRIC POWER SYSTEM ET AL. *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. [Certiorari granted, 423 U. S. 1047.] Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 75–628. CRAIG ET AL. *v.* BOREN, GOVERNOR OF OKLAHOMA, ET AL. Appeal from D. C. W. D. Okla. [Probable jurisdiction noted, 423 U. S. 1047.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 75–6205. CARUTH *v.* MOORE, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Denied

No. 75–621. HAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 472.

No. 75–771. COLLECTOR OF REVENUE OF LOUISIANA *v.* CHICAGO BRIDGE & IRON CO. Sup. Ct. La. Certiorari denied. Reported below: 317 So. 2d 605.

No. 75–833. GALAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–835. FISHER *v.* USERY, SECRETARY OF LABOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 2d 1404.

No. 75–843. BENISH ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1051.

No. 75–859. ROWBOTHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 522 F. 2d 1279.

No. 75–874. WHITE ET AL. *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 294 Ala. 502, 319 So. 2d 247.

No. 75–879. J. H. RUTTER REX MANUFACTURING CO., INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 97.

No. 75–924. DICKSON *v.* FORD, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 234.

No. 75–947. ATLANTIC MARINE, INC. *v.* JIG III CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 171.

No. 75–956. PACK ET AL. *v.* TENNESSEE EX REL. SWANN, DISTRICT ATTORNEY GENERAL. Sup. Ct. Tenn. Certiorari denied. Reported below: 527 S. W. 2d 99.

No. 75–980. DIFCO LABORATORIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 522 F. 2d 1275.

No. 75–988. EPOCH PRODUCING CORP. *v.* KILLIAM SHOWS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 522 F. 2d 737.

No. 75–993. WHITT *v.* VAUTHIER. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 316 So. 2d. 202.

No. 75–998. CHURCH *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 115 N. H. 537, 345 A. 2d 392.

No. 75–1012. CORNELIUS ET AL. *v.* CITY OF PARMA, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 2d 1401.

No. 75–1022. CALHOUN *v.* RIVERSIDE RESEARCH INSTITUTE ET AL. C. A. 2d Cir. Certiorari denied.

No. 75–5680. QUINN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 1250.

No. 75–5778. RUDMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–5799. SCOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 521 F. 2d 1188.

No. 75–5822. SOTO *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 21 Ore. App. 794, 537 P. 2d 142.

No. 75–5870. DRAUGHON *v.* REES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 75–5877. TURNER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 853.

No. 75–5902. REED *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 740.

No. 75–5904. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5907. YOUNG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 512 F. 2d 321.

No. 75–5908. ROBINSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 169 U. S. App. D. C. 129, 515 F. 2d 360.

No. 75–5924. ROSE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 525 F. 2d 1026.

No. 75–5926. HARVEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 529.

No. 75–5927. SNOW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 525 F. 2d 317.

No. 75–5928. BALLARO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6009. HASKINS ET AL. *v.* FREEDMAN ET AL. C. A. 1st Cir. Certiorari denied.

No. 75–6044. RODRIGUEZ *v.* STONE, INSTITUTION SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 75–6073. COLEMAN *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 522 F. 2d 1278.

No. 75–6075. WALKER *v.* COMMITTEE ON EXAMINATIONS AND ADMISSIONS. Sup. Ct. Ariz. Certiorari denied. Reported below: 112 Ariz. 134, 539 P. 2d 891.

No. 75–6083. SMITH *v.* GITCHELL, SHERIFF. C. A. 6th Cir. Certiorari denied.

No. 75–6076. HENDRIX *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1053.

No. 75–6084. PICCIONI *v.* SEGRE ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–6086. GRANDHAM *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 528 S. W. 2d 220.

No. 75–6094. PAINE *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 527 F. 2d 173.

No. 75–6095. TYRRELL *v.* CUPP, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 75–6097. ANDERSON *v.* LAYKIN. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–6098. JACKSON *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT. Sup. Ct. Cal. Certiorari denied.

No. 75–6140. THRASHER *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 74–1032. HUDGENS *v.* LOCAL 315, RETAIL & WHOLESALE DEPARTMENT STORE UNION, AFL–CIO. Ct. App. Ga. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 133 Ga. App. 329, 210 S. E. 2d 821.

No. 75–1007. HOWMET CORP. ET AL. *v.* MERCANTILE NATIONAL BANK OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 524 F. 2d 1031.

No. 75–1009. DUNLOP HOLDINGS, LTD. *v.* RAM GOLF CORP. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 524 F. 2d 33.

No. 75–5220. FROST *v.* MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 515 F. 2d 57.

No. 75–655. WILSON ET AL. *v.* MEANS ET AL. C. A. 8th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 522 F. 2d 833.

No. 75–669. SIELAFF, CORRECTIONS DIRECTOR, ET AL. *v.* HICKMAN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 521 F. 2d 378.

No. 75–711. WESTERN AIRLINES, INC. *v.* CONTINENTAL AIR LINES, INC. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 171 U. S. App D. C. 295, 519 F. 2d 944.

No. 75–864. LAVALLEE, CORRECTIONAL SUPERINTENDENT *v.* LLUVERAS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 526 F. 2d 585.

No. 75–994. LIVINGSTON *v.* SHELTON. Sup. Ct. Wash. Certiorari denied. Motion of respondent for award of damages for delay denied. Reported below: 85 Wash. 2d 615, 537 P. 2d 774.

Rehearing Denied

No. 75–755. 28 EAST JACKSON ENTERPRISES, INC. *v.* CULLERTON, COOK COUNTY ASSESSOR, ET AL., 423 U. S. 1073; and

No. 75–5601. SMITH *v.* STYNCHCOMBE, SHERIFF, 423 U. S. 1089. Petitions for rehearing denied.

No. 75–519. JAMIESON *v.* COMMISSIONER OF INTERNAL REVENUE, 423 U. S. 1009. Petition for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Third Circuit for the purpose of hearing the following cases: *Adams* v. *Berger*, No. 75–2389; and *Hartman* v. *A. B. A.*, No. 76–1050, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

MARCH 11, 1976

Miscellaneous Order

No. A–719. ENOMOTO, CORRECTIONS DIRECTOR, ET AL. *v.* SPAIN ET AL. [The Court issued in amended form its order of March 8, 1976. See *ante*, p. 951.]

MARCH 22, 1976

Affirmed on Appeal

No. 75–595. TUCKER, SECRETARY OF PENNSYLVANIA, ET AL. *v.* SALERA ET AL. Affirmed on appeal from D. C. E. D. Pa. Reported below: 399 F. Supp. 1258.

No. 75–6021. WOODS *v.* HARDEN, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES, ET AL. Affirmed on appeal from D. C. N. D. Ga.

Appeals Dismissed

No. 75–656. HAAS *v.* HAAS. Appeal from Sup. Ct. Miss. dismissed for want of a properly presented federal question. Reported below: 315 So. 2d 447.

No. 75–967. BEARDEN ET AL. *v.* HARDWARE MUTUAL CASUALTY CO. ET AL. Appeal from Sup. Ct. Mo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 528 S. W. 2d 754.

No. 75–5994. FINKEN *v.* ROOP, ADMINISTRATOR, ALLENTOWN STATE HOSPITAL. Appeal from Super. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 234 Pa. Super. 155, 339 A. 2d 764.

No. 75–1061. WESTERN GRAIN CO. *v.* ALABAMA. Appeal from Ct. Civ. App. Ala. dismissed for want of substantial federal question. Reported below: 55 Ala. App. 690, 318 So. 2d 719.

No. 75–6108. HARDY *v.* OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument.

Certiorari Granted—Vacated and Remanded

No. 74–1420. JAMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Commis-*

sioner of Internal Revenue v. *Shapiro, ante,* p. 614. MR. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 510 F. 2d 860.

No. 74–1476. UNITED STATES *v.* SELLERS; and

No. 74–6503. SELLERS *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner in No. 74–6503 for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *United States* v. *Gaddis, ante,* p. 544. MR. JUSTICE STEVENS took no part in the consideration or decision of these cases. Reported below: 520 F. 2d 1281.

No. 75–167. UNITED STATES *v.* PHILLIPS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Gaddis, ante,* p. 544. MR. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 518 F. 2d 108.

No. 75–272. WILLIAMS, DISTRICT ATTORNEY GENERAL *v.* HILLIARD. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Imbler* v. *Pachtman, ante,* p. 409. Reported below: 516 F. 2d 1344.

Miscellaneous Orders

No. A–760. CALIFORNIA STATE BOARD OF OPTOMETRY *v.* CALIFORNIA CITIZENS ACTION GROUP ET AL. Application to stay preliminary injunction entered by the United States District Court for the Central District of California, entered February 5, 1976, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, granted pending further order of the Court. MR. JUS-

TICE STEVENS would deny the application. Motion of Terminal-Hudson Electronics of California, Inc., dba Opti-Cal, for leave to intervene as an appellee denied.

No. 74–1487. UNITED STATES *v.* MACCOLLOM. C. A. 9th Cir. [Certiorari granted, 423 U. S. 821.] Motion of the Solicitor General to permit Frank H. Easterbrook, Esquire, to argue *pro hac vice* on behalf of the United States granted.

No. 74–6257. GREGG *v.* GEORGIA. Sup. Ct. Ga.;

No. 75–5394. JUREK *v.* TEXAS. Ct. Crim. App. Tex.;

No. 75–5491. WOODSON ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C.;

No. 75–5706. PROFFITT *v.* FLORIDA. Sup. Ct. Fla.; and

No. 75–5844. ROBERTS *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, 423 U. S. 1082.] Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* granted.

No. 75–130. QUINN, COMMISSIONER, CHICAGO FIRE DEPARTMENT *v.* MUSCARE. C. A. 7th Cir. [Certiorari granted, 423 U. S. 891.] Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 75–552. KLEPPE, SECRETARY OF THE INTERIOR, ET AL. *v.* SIERRA CLUB ET AL.; and

No. 75–561. AMERICAN ELECTRIC POWER SYSTEM ET AL. *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. [Certiorari granted, 423 U. S. 1047.] Joint motion of petitioners for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 75–567. OREGON EX REL. STATE LAND BOARD *v.* CORVALLIS SAND & GRAVEL CO.; and

No. 75–577. CORVALLIS SAND & GRAVEL CO. *v.* OREGON EX REL. STATE LAND BOARD. Sup. Ct. Ore. [Certiorari granted, 423 U. S. 1048.] Motion of Corvallis Sand & Gravel Co. et al. for additional time for oral argument denied. Motion of Attorney General of California for leave to participate in oral argument as *amicus curiae* denied.

No. 75–616. VILLAGE OF ARLINGTON HEIGHTS ET AL. *v.* METROPOLITAN HOUSING DEVELOPMENT CORP. ET AL. C. A. 7th Cir. [Certiorari granted, 423 U. S. 1030.] Motions of League of Women Voters of the United States et al. and American Society of Planning Officials for leave to file briefs as *amici curiae* granted. MR. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 75–929. ESTELLE, CORRECTIONS DIRECTOR, ET AL. *v.* GAMBLE. C. A. 5th Cir. [Certiorari granted, *ante*, p. 907.] Motion of Attorney General of Texas to permit Bert W. Pluymen, Esquire, to argue *pro hac vice* on behalf of petitioners granted.

No. 75–6211. SANDERS *v.* GAGNON, WARDEN;

No. 75–6218. ASHINSKY *v.* UNITED STATES; and

No. 75–6262. MILLETICH *v.* REES, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 75–6057. PROFFITT *v.* UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT;

No. 75–6103. WHIPPLE *v.* UNITED STATES; and

No. 75–6183. SPEED *v.* JOHNSON, U. S. ATTORNEY. Motions for leave to file petitions for writs of mandamus denied.

No. 75–6031. DINSIO *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 75–1019. BOSTON STOCK EXCHANGE ET AL. *v.* STATE TAX COMMISSION ET AL. Appeal from Ct. App. N. Y. Probable jurisdiction noted. Reported below: 37 N. Y. 2d 535, 337 N. E. 2d 758.

No. 75–1064. KREMENS, HOSPITAL DIRECTOR, ET AL. *v.* BARTLEY ET AL. Appeal from D. C. E. D. Pa. Probable jurisdiction noted. Reported below: 402 F. Supp. 1039.

No. 75–5952. TRIMBLE ET AL. *v.* GORDON ET AL. Appeal from Sup. Ct. Ill. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

Certiorari Granted

No. 75–746. ATLAS ROOFING CO., INC. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 5th Cir.; and

No. 75–748. FRANK IREY, JR., INC. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 3d Cir. Certiorari granted limited to Question 2 presented by the petitions which reads as follows: "Assuming *arguendo* that such civil penalties and enforcement procedures are civil in nature and effect, whether such procedures deny the defendant employer his right to jury trial guaranteed by the Seventh Amendment to the Constitution." Cases consolidated and a total of one hour allotted for oral argument. Reported below: No. 75–746, 518 F. 2d 990; No. 75–748, 519 F. 2d 1200.

Certiorari Denied. (See also Nos. 75–967 and 75–5994, *supra.*)

No. 75–528. NONNEWAUG REGIONAL SCHOOL DISTRICT No. 14 ET AL. *v.* SCOTT. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 799.

No. 75–571. SHANNON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 521 F. 2d 56.

No. 75–724. PUBLIC INTEREST RESEARCH GROUP ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 522 F. 2d 1060.

No. 75–747. DAN J. SHEEHAN CO. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 520 F. 2d 1036.

No. 75–776. DU PUY ET AL. *v.* DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR. C. A. 7th Cir. Certiorari denied. Reported below: 519 F. 2d 536.

No. 75–794. JANSEN *v.* VIRGINIA. Cir. Ct. Fauquier County, Va. Certiorari denied.

No. 75–802. ACUNA ET AL. *v.* CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–818. LUNA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 525 F. 2d 4.

No. 75–852. GRASAVAGE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1052.

No. 75-869. ROBERTS *v.* CIVIL AERONAUTICS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 172 U. S. App. D. C. 198, 521 F. 2d 298.

No. 75-901. ESBER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1054.

No. 75-910. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1054.

No. 75-911. WARD *v.* UNITED STATES; and
No. 75-912. SLINGERLAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 75-913. HENRITZE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 522 F. 2d 1279.

No. 75-922. BANKERS TRUST CO. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 422, 518 F. 2d 1210.

No. 75-925. WOOD ET AL. *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 75-940. CONSUMER FEDERATION OF AMERICA ET AL. *v.* BUTZ, SECRETARY OF AGRICULTURE, ET AL.;
No. 75-995. INDEPENDENT MEAT PACKERS ASSN. *v.* BUTZ, SECRETARY OF AGRICULTURE, ET AL.; and
No. 75-996. NATIONAL ASSOCIATION OF MEAT PURVEYORS ET AL. *v.* BUTZ, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 526 F. 2d 228.

No. 75-942. TUCKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 77.

No. 75–948. CALAWAY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 524 F. 2d 609.

No. 75–949. DRAGANESCU ET AL. *v.* FIRST NATIONAL BANK OF HOLLYWOOD. C. A. 5th Cir. Certiorari denied. Reported below: 522 F. 2d 1278.

No. 75–951. NUCLEUS OF CHICAGO HOMEOWNERS ASSN. ET AL. *v.* HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 524 F. 2d 225.

No. 75–952. FLINN ET AL. *v.* FMC CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 528 F. 2d 1169.

No. 75–959. SAN FRANCISCO-OAKLAND MAILERS UNION No. 18 ET AL. *v.* JOHNSON. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–970. MATHEWS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 520 F. 2d 323.

No. 75–981. McGEE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1121.

No. 75–990. DAVIES ET AL. *v.* CINCINNATI GAS & ELECTRIC CO. ET AL. Ct. App. Ohio, Butler County. Certiorari denied.

No. 75–1003. STARK ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 525 F. 2d 422.

No. 75–1017. LUCAS ET AL. *v.* HOPE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 234.

No. 75–1025. LaRocca *v.* Lane, Judge. Ct. App. N. Y. Certiorari denied. Reported below: 37 N. Y. 2d 575, 338 N. E. 2d 606.

No. 75–1031. Sifton et al. *v.* County of Ventura; and Fries *v.* Combs. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–1036. Banks *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 308 So. 2d 203.

No. 75–1037. Moog, Inc. *v.* Pegasus Laboratories, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 2d 501.

No. 75–1039. Baldasarro *v.* Ohio. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 75–1042. Silver et al. *v.* Queen's Hospital, aka Queen's Medical Center, et al. C. A. 9th Cir. Certiorari denied. Reported below: 518 F. 2d 555.

No. 75–1044. Thoms *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 30 Ill. App. 3d 229, 332 N. E. 2d 538.

No. 75–1045. Corning Glass Works *v.* Fischer & Porter Co. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1050.

No. 75–1047. Grant *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 75–1057. Belanger *v.* Matteson et al. Sup. Ct. R. I. Certiorari denied. Reported below: 115 R. I. 332, 346 A. 2d 124.

No. 75–1083. M. C. Manufacturing Co., Inc., et al. *v.* Texas Foundries, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 1059.

No. 75–1080. FRANKLIN *v.* EDGAR R. LEVY CO. ET AL. C. A. 2d Cir. Certiorari denied.

No. 75–1096. LOCAL UNION NO. 81, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO *v.* ALLIED EMPLOYERS, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–1107. HOLZMAN, TRUSTEE IN BANKRUPTCY *v.* ALFRED M. LEWIS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 524 F. 2d 761.

No. 75–1112. GULF OIL CO., U. S., AKA GULF OIL CORP. ET AL. *v.* PALMER COAL & ROCK CO. C. A. 10th Cir. Certiorari denied. Reported below: 524 F. 2d 884.

No. 75–1159. ANDERSON CO. ET AL. *v.* JOHN P. CHASE, INC. C. A. 2d Cir. Certiorari denied.

No. 75–1166. COLUMBIA STEAMSHIP CO., INC. *v.* AMERICAN MAIL LINE, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 510 F. 2d 29.

No. 75–5741. CLARK *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–5811. MCDANIEL *v.* UNITED STATES; and
No. 75–5860. MORRISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5840. RIGGAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 462 Pa. 185, 339 A. 2d 761.

No. 75–5842. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 696.

No. 75–5878. MCFALL *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 235 Ga. 105, 218 S. E. 2d 839.

No. 75–5857. RUBIO-CASTRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5861. HAWKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 2d 647.

No. 75–5887. PRYOR *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Orange. Certiorari denied.

No. 75–5899. MEADOWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 365.

No. 75–5901. WHITE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 61 Ill. 2d 288, 335 N. E. 2d 457.

No. 75–5909. LEE *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 75–5912. BROOKS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 51 Cal. App. 3d 602, 124 Cal. Rptr. 492.

No. 75–5930. ADGERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 75–5931. STALEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75–5934. ACUNA-PALOMINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5936. HERNANDEZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5937. PEREZ-VEGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5940. KLATKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5942. GIBLIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 523 F. 2d 42.

No. 75–5946. HARPER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5947. PRICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5948. WILSON *v.* UNITED STATES; and
No. 75–5972. KELLEY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 526 F. 2d 615.

No. 75–5951. LONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5954. WHEELER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5955. PRICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1054.

No. 75–5957. HALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 75–5966. JOHNSON *v.* AMERICAN CREDIT COMPANY OF GEORGIA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 478.

No. 75–5967. BROOKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5969. PUTIC *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5976. VENSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 524 F. 2d 1404.

No. 75–5970. BAILEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 526 F. 2d 139.

No. 75–5977. OLIPHANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 525 F. 2d 505.

No. 75–5978. BARRON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5979. MITZKOFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 488.

No. 75–5982. TRANQUILLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5984. BAKER *v.* RUMSFELD, SECRETARY OF DEFENSE. C. A. 6th Cir. Certiorari denied. Reported below: 523 F. 2d 1031.

No. 75–5985. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 529 F. 2d 517.

No. 75–5987. TREVINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1231.

No. 75–5992. PACK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1231.

No. 75–5993. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 485.

No. 75–5995. GOINS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 75–6001. TREVITHICK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 526 F. 2d 838.

No. 75–5997. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 517 F. 2d 506.

No. 75–5999. WOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6000. CEJA-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6003. BENDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1054.

No. 75–6007. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 788.

No. 75–6014. PRYOR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 75–6016. CLAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–6017. RAY *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 812.

No. 75–6018. FONTAINE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 526 F. 2d 514.

No. 75–6026. MORGAN *v.* MONTANYE, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 516 F. 2d 1367.

No. 75–6033. OLIVER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 525 F. 2d 731.

No. 75–6047. ATKINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–6088. GROSE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 1115.

No. 75–6089. CAVITT *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1053.

No. 75–6114. WINN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1231.

No. 75–6115. DONNELLY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 233 Pa. Super. 396, 336 A. 2d 632.

No. 75–6119. SMITH *v.* SUPREME COURT OF WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 85 Wash. 2d 738, 539 P. 2d 83.

No. 75–6120. DAVENPORT *v.* HOUSING AND DEVELOPMENT ADMINISTRATION OF THE CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 75–6122. GALLOWAY *v.* BREWER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 525 F. 2d 369.

No. 75–6128. NELSON *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 75–6131. REPOSA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–6138. MAWHINNEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 75–6139. JAMISON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 75–6157. JII *v.* COLUMBUS COATED FABRICS. C. A. 6th Cir. Certiorari denied.

No. 75–6161. BROWN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 75–6160. DAVIS *v.* POLICE DEPARTMENT, CITY OF YOUNGSTOWN, OHIO, ET AL. C. A. 6th Cir. Certiorari denied.

No. 75–6165. RAUSER *v.* LANCASTER COUNTY OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 6167. STOUT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 75–6186. HARRISON *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 75–6188. LENNON *v.* CLARK ET UX. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–6224. WITHERS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 44 Ohio St. 2d 53, 337 N. E. 2d 780.

No. 74–418. DUBA *v.* MCINTYRE ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 501 F. 2d 590.

No. 74–987. WEATHERS *v.* EBERT, COMMONWEALTH ATTORNEY OF PRINCE WILLIAM COUNTY. C. A. 4th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 505 F. 2d 514.

No. 74–5439. GUERRERO *v.* BARLOW, DISTRICT ATTORNEY OF BEXAR COUNTY. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 494 F. 2d 1190.

No. 74–6226. HULSTINE *v.* MOSS, JUDGE, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 74–5869. DIXON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 507 F. 2d 683.

No. 74–6408. CARTER *v.* ROBERTSON. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 75–867. KEANE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 522 F. 2d 534.

No. 75–876. UNITED STATES STEEL CORP. *v.* METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 30 Ill. App. 3d 360, 332 N. E. 2d 426.

No. 75–1099. SCOTT, ATTORNEY GENERAL OF ILLINOIS, ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 525 F. 2d 178.

No. 75–5054. GRIFFIN *v.* VICTOR ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 510 F. 2d 972.

No. 75–5329. BELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 75–5457. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 518 F. 2d 108.

No. 75–5849. WARREN *v.* AARON, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 525 F. 2d 696.

No. 75–5876. DORSZYNSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 524 F. 2d 190.

No. 75–5963. EDGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 521 F. 2d 1403.

No. 75–792. NORTHSIDE REALTY ASSOCIATES, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 518 F. 2d 884.

No. 75–821. BUSH *v.* UNITED STATES. C. A. 7th Cir. Motion for oral argument on whether certiorari should be granted denied. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion and petition. Reported below: 522 F. 2d 641.

No. 75–846. HUNTER, MAYOR OF YOUNGSTOWN, ET AL. *v.* FRATERNAL ORDER OF POLICE, YOUNGSTOWN LODGE NO. 28, ET AL. Ct. App. Ohio, Mahoning County. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN would deny certiorari, it appearing that the judgment below rests upon adequate state grounds. Reported below: 49 Ohio App. 2d 185, 360 N. E. 2d 708.

No. 75–865. TERRIBERRY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 517 F. 2d 286.

No. 75–1034. TRAINOR, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* BANKS ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 525 F. 2d 837.

No. 75–1082. KNIGHT ET AL. *v.* SOUTH CENTRAL BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 518 F. 2d 1405.

No. 75–6156. MOLINAR *v.* WESTERN ELECTRIC CO. ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 525 F. 2d 521.

No. 75–1092. PIHER INTERNATIONAL CORP. ET AL. *v.* CTS CORP. C. A. 7th Cir. Motion to strike petitioners' supplemental brief, or, in the alternative, additional time to file a responsive brief denied. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion and petition. Reported below: 527 F. 2d 95.

No. 75–5897. LEMING ET AL. *v.* UNITED STATES. C. A. 9th Cir. Motion of John R. Jones and Walter Mark Conway to join in the petition for writ of certiorari granted. Certiorari denied. Reported below: 532 F. 2d 647.

No. 75–6264. ADAMS ET AL. *v.* CENTRAL OF GEORGIA RAILWAY CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 524 F. 2d 1230.

Rehearing Denied

No. 75–588. WASHINGTON ET AL. *v.* UNITED STATES ET AL., 423 U. S. 1086. Petition for rehearing denied.

No. 75–782. PELTZMAN *v.* CENTRAL GULF LINES, INC., 423 U. S. 1074;

No. 75–827. SNOW ET AL. *v.* CITY OF MEMPHIS ET AL., 423 U. S. 1083;

No. 75–5626. LIPSCOMB *v.* UNITED STATES, *ante*, p. 934; and

No. 75–5862. HOFFMAN *v.* GEORGETOWN UNIVERSITY HOSPITAL CORP., 423 U. S. 1090. Petitions for rehearing denied.

No. 74–538. UNITED STATES *v.* WATSON, 423 U. S. 411; and

No. 74–966. AMERICAN FOREIGN STEAMSHIP CO. *v.* MATISE, 423 U. S. 150. Petitions for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions.

MARCH 23, 1976

Dismissal Under Rule 60

No. 75–6280. NORWOOD ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari dismissed as to petitioner Norwood under this Court's Rule 60.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 979 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

COLEMAN, SECRETARY OF TRANSPORTATION *v.* PACCAR INC. ET AL.

ON APPLICATION TO VACATE STAY

No. A–651. Decided February 2, 1976

Application by the Secretary of Transportation to vacate the Court of Appeals' order staying the operation of a certain motor vehicle safety standard, which was before the court upon respondents' petition for review, is granted, where it appears that the Court of Appeals in ordering the stay failed to consider the likelihood of respondents' success on the merits, and the Secretary has demonstrated that irreparable harm might result from the stay.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Secretary of Transportation has moved to vacate a stay order entered by the United States Court of Appeals for the Ninth Circuit in a case presently pending before that court. The case arose in that court by reason of a petition for review of amendments to a motor vehicle safety standard promulgated by the Secretary's delegate on November 12, 1974, and scheduled to take effect on March 1, 1975. (MVSS–121; see 49 CFR § 571.-121). The original petition for review in the Court of Appeals was filed by respondent PACCAR on January 3, 1975, and meanwhile two other challenges to the same standard filed in two other Courts of Appeals were transferred to the Court of Appeals for the Ninth Circuit and consolidated with PACCAR's challenge. PACCAR moved to stay the effective date of the regulation in the Court of Appeals for the Ninth Circuit, but its motion was denied on February 10, 1975. Oral argument on the

merits of the petition for review was set by the Court of Appeals for January 16, 1976. In December 1975, the Secretary's delegate gave notice that he proposed to modify the standard in question, and the Secretary moved in the Ninth Circuit to postpone oral argument until after the modification. The Court of Appeals advised counsel for the Secretary to appear at oral argument on January 16, 1976, as scheduled.

Following oral argument, the Court of Appeals entered the following order:

> "IT IS HEREBY ORDERED that [the motor vehicle safety standard] is stayed for a period of sixty days, this stay to remain in effect thereafter pending further order of this court upon the application of any party."

It is incumbent upon me first to determine whether I have jurisdiction to grant the relief requested by the Secretary. This case does not come before me in the usual posture of a stay application, where a court of appeals has rendered a judgment disposing of a case before it and the losing litigant seeks a stay of the judgment of the court of appeals pending the filing of a petition for certiorari to review that judgment in this Court. There the question is whether four Justices are likely to vote to grant certiorari, and what assessment is to be made of the equities pertinent to the grant of such interim relief. *Edelman* v. *Jordan,* 414 U. S. 1301 (1973) (REHNQUIST, J., in chambers). Here the Court of Appeals has not finally disposed of the case; indeed, it has not ruled on the merits nor apparently rescheduled oral argument on the question presented by the petition for review of the safety standard.

Pursuant to Rules 50 and 51 of this Court I have authority as Circuit Justice to take any action which the full Court might take under 28 U. S. C. § 1651. But

even the full Court under § 1651 may issue writs only in aid of its jurisdiction. The Secretary contends that the Court of Appeals' stay order is the equivalent of a preliminary injunction which, if issued by a three-judge district court, would be reviewable here. Certainly the full Court, in the exercise of its normal appellate jurisdiction, has noted probable jurisdiction, heard argument, and written opinions in cases where the district court has issued only a preliminary injunction. See *Brown* v. *Chote,* 411 U. S. 452 (1973); *Withrow* v. *Larkin,* 421 U. S. 35 (1975). But in each of those cases the action of the District Court was made appealable to this Court by statute. 28 U. S. C. § 1253. There is no similar provision for appeal *eo nomine* from an interlocutory order of a court of appeals.

This Court has jurisdiction to review by certiorari any case in a court of appeals, 28 U. S. C. § 1254. Although the Secretary is not presently seeking certiorari from this Court in order to review the stay order of the Court of Appeals, if I have authority as Circuit Justice to vacate the stay, it must be on the ground that the vacation of the stay is "in aid of this Court's jurisdiction" to review by certiorari a final disposition on the merits of respondents' petition to review and set aside the safety standard in question. See *McClellan* v. *Carland,* 217 U. S. 268, 279–280 (1910).

The closest opinions in point seem to be the in-chambers opinions of my Brother MARSHALL in *Holtzman* v. *Schlesinger,* 414 U. S. 1304 (1973), and of Mr. Justice Black in *Meredith* v. *Fair,* 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962). Both opinions considered on their merits motions to vacate interlocutory stays issued by a judge or panel of judges of a Court of Appeals; in *Holtzman* the motion was denied and in *Meredith* it was granted. I think the sense of the two opinions, and likewise that of

Mr. Justice Douglas' dissent in *Schlesinger* v. *Holtzman*, 414 U. S. 1321, 1322 (1973), is that a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay. A narrower rule would leave the party without any practicable remedy for an interlocutory order of a court of appeals which was *ex hypothesi* both wrong and irreparably damaging;* a broader rule would permit a single Justice of this Court to simply second-guess a three-judge panel of the court of appeals in the application of principles with respect to which there was no dispute.

The Secretary contends that since the action of the Court of Appeals is equivalent to a preliminary injunction issued by a district court, the Court of Appeals should be required to make the same sort of findings

*The losing litigant could, of course, petition this Court for a writ of certiorari to review the stay order of the court of appeals. Since the case is "in" the court of appeals within the meaning of 28 U. S. C. § 1254, the Court would presumably have jurisdiction to grant the writ if it chose to do so in the exercise of its discretion. *New York Times Co.* v. *United States*, 403 U. S. 942 (1971). See also *Far East Conference* v. *United States*, 342 U. S. 570 (1952). But the exercise of such power by the Court is an extremely rare occurrence. Supreme Court Rule 20.

The losing litigant might likewise proceed by a motion to vacate the stay presented to the full Court. But since my authority under Rules 50 and 51 of the Court is coextensive with that of the Court, if I am right in the standards which govern me in exercising jurisdiction under 28 U. S. C. § 1651, the full Court would have no broader authority in such an instance than that which I exercise today.

before granting such a stay as are required of a district court by Fed. Rule Civ. Proc. 65. Perhaps the full Court in the exercise of its supervisory authority could impose such a requirement, even though no rule or statute does, but certainly a Circuit Justice in chambers may not do so. A court in staying the action of a lower court, see *O'Brien* v. *Brown*, 409 U. S. 1, 3 (1972), or of an administrative agency, *Sampson* v. *Murray*, 415 U. S. 61 (1974), must take into account factors such as irreparable harm and probability of success on the merits. But in the absence of a statute, rule, or controlling precedent there is no fixed requirement that a court recite the fact that it has taken these into consideration, or explain its reason for taking the action which it did.

It is thus not dispositive that the Court of Appeals failed to specifically address in terms the factors of irreparable harm and probable success on the merits. But this does not mean that the Court of Appeals' action in entering the stay is entirely beyond review. For if the record convincingly demonstrates that the Court of Appeals could not have considered each of these factors at all and the effect of its decision is shown to pose a danger of irreparable harm impairing this Court's ability to provide full relief in the event it ultimately reviews the action of the Court of Appeals on the merits, I believe that I should afford the interim relief sought.

The following description of the order of the court, and its instructions to counsel, is taken from the Secretary's application, but is not disputed in material portion by respondents:

> "When the case was called for oral argument the court announced to the parties that it was uncertain about the status of MVSS 121 due to the modification proposed by NHTSA [National Highway Traffic Safety Administration], that it did not under-

> stand the contentions of the parties on the merits, and that it was suspending the operation of MVSS 121 forthwith for a minimum period of 60 days, after which it would continue the suspension while entertaining appropriate motions from the parties. The court instructed the parties to submit an order whose terms would require the parties to agree upon another order setting forth the issues in controversy, the parties' position on each issue, the documents in the record relevant to the issues, and the uncontroverted facts, or, failing such agreement, to pay for the services of a 'master,' to be appointed by the court, who would examine the pleadings, the record, and the briefs and submit to the court for approval a proposed order fixing the issues and record for review."

I can readily understand the uncertainty of the Court of Appeals with respect to the issues in controversy, the parties' position on them, and the like. I have resolutely resisted the efforts of both parties to dispel my own uncertainty on these issues, which remains pristine. Congress in a complex statute has imposed an arduous burden on the Secretary's delegate, and then provided for judicial review under the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*, which places enormously difficult burdens on the Court of Appeals. But the complexity of the issue does not change the time-honored presumption in favor of the validity of the Administrator's determination, nor shift the burden of showing probable success from the shoulders of the parties who seek to upset that determination. See *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602 (1944); *Permian Basin Area Rate Cases*, 390 U. S. 747, 767 (1968).

I do not find the Court of Appeals' direction to the parties with respect to the formulation of issues and

stipulation as to the record to be consistent with a finding, which must be implied since it is not expressed, that respondents would probably succeed on the merits of their petition to set aside the standard promulgated by the Secretary's delegate. Moreover, applicant has persuasively urged that the Government will suffer irreparable harm if MVSS–121 is not permitted to remain in effect during the pendency of the litigation on the merits. Congress' desire "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," § 1, 80 Stat. 718, 15 U. S. C. § 1381, is currently being pursued under the statutory scheme by requiring compliance with prescribed motor vehicle safety standards at the time of vehicle manufacture. 15 U. S. C. § 1397 (a)(1). Presently, vehicles manufactured while a standard is not in effect may be later sold or transferred without restriction and may thereby find their way to the highways although not in compliance with safety requirements properly deemed necessary by the Secretary.

As long as the stay entered by the Court of Appeals remains in effect, manufacturers are free to produce as many vehicles as they can and so may obtain substantial stockpiles of noncomplying vehicles for later sale. The Secretary has represented to me that vehicle manufacturers such as respondents may, during the initial 60-day period of the Ninth Circuit's stay, be able to produce enough vehicles to satisfy anticipated demand for as much as a full year thereafter. I do not understand this suggestion to be seriously disputed by respondents.

Thus, even if the stay ordered by the Court of Appeals is ultimately dissolved and the Secretary's decision upheld on the merits, the goals of the federal motor vehicle safety program will have been dealt a serious setback.

Effective implementation at the manufacturing stage of the congressionally mandated safety program will have been delayed for a year or more. And the natural desire on the part of operators to obtain a fleet of the cheaper, noncomplying vehicles while they are still available may cause increased purchases of such vehicles now, resulting in a subsequent prolonged depression in the market for complying vehicles if and when the safety standard is again effective. This predictable eventuality will further impede Congress' intention to promote improved highway safety as expeditiously as is practicable.

The Secretary has, in my opinion, therefore not only shown that the Court of Appeals did not evaluate the likelihood of respondents' success on the merits, but has in addition shown that the harm flowing from the stay issued by the Court of Appeals could not be redressed by an ultimate decision, either in that court or this, in his favor on the merits.

The Secretary's motion to vacate the stay order entered by the Court of Appeals on January 16, 1976, is therefore granted, without prejudice to the right of respondents or any of them to renew their application for a stay of the standard in the Court of Appeals agreeably to the rules and practices of that court.

BRADLEY ET AL. *v.* LUNDING, CHAIRMAN, STATE BOARD OF ELECTIONS COMMISSIONERS, ET AL.

ON APPLICATION FOR STAY

No. A–695 (75–1146). Decided February 17, 1976

Application by appellant independent candidates for judicial office in Illinois for stay, pending this Court's disposition of appeal, of Illinois Supreme Court's judgment reversing Circuit Court's order enjoining appellee State Board of Elections Commissioners from conducting a lottery to assign ballot positions in accordance with Board regulation prescribing lottery system for breaking ties resulting from simultaneous filing of petitions for nomination to elective office, is denied, where there is insufficient indication of unfairness or irreparable injury and (because the questions presented by the appeal are capable of repetition) no suggestion that the forthcoming election will moot the case.

MR. JUSTICE STEVENS, Circuit Justice.

On February 13, 1976, appellants filed an application for a stay of the judgment of the Supreme Court of Illinois entered on January 19, 1976, reversing an order entered by the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Ill., on January 12, 1976, enjoining the defendant officers of the Illinois State Board of Election Commissioners from conducting a lottery for the purpose of assigning ballot positions in accordance with Regulation 1975–2 adopted by the State Board of Elections on November 21, 1975.

Regulation 1975–2 prescribes a lottery system for breaking ties resulting from the simultaneous filing of petitions for nomination to elective office.[1] Appellants

[1] The regulation provides in part:

"1. The names of all candidates who filed simultaneously for the same office shall be listed alphabetically and shall be numbered consecutively commencing with the number one which shall be as-

are independent candidates for judicial office who argue that the regulation increases the probability that their names will appear in the bottom portion of the ballot rather than in the middle portion, and therefore that their federal constitutional rights are impaired.[2] This consequence flows from the fact that candidates filing a group petition for the same office are treated as one for lottery purposes.

As I understand the regulation, it also increases the

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signed to the candidate whose name is listed first on the alphabetical list; provided, however, that candidates filing a group petition for the same office shall be treated as one in the alphabetical listing using the name of the first candidate for such office to appear on the petitions as the name to be included in the alphabetical list. . . .

"2. All ties will be broken by a *single* drawing. . . ."

[2] Two separate election contests are involved. Ten judges are to be selected by the voters of the city of Chicago and 15 by the voters of Cook County. With respect to the municipal election, at the opening of the filing period, 14 candidates filed contemporaneous petitions for Democratic nominations for the 10 Chicago judgeships. Four of these filed individual petitions; the other 10 filed a single group petition. Pursuant to the lottery procedure prescribed by the regulation, see n. 1, *supra*, each of the individual petitions, as well as the group petition, had one chance in five of being drawn for the top position on the ballot. Thus, each individual candidate's chance of receiving the first position was considerably better than if all 14 names were treated separately in the drawing. On the other hand, since the group petition also had one chance in five of being drawn first, the four independents ran the risk that if that should happen, none of them could appear in any of the first 10 positions.

Appellants' statistical evidence indicates that if the names of all 14 municipal candidates were placed in the lottery on an individual basis, each of the appellants would have only a 28.6-percent chance (4 out of 14) of being below the top 10, whereas the regulation increases that chance to 50 percent. On the other hand, each of them now has a 50-percent chance of being among the top four names on the ballot, whereas on a completely independent basis, each would have only a 28.6-percent chance.

probability that each of the appellants' names will appear in the top portion of the ballot rather than the middle portion. Thus, the adverse effect of increasing the probability of an especially unfavorable position is offset by the beneficial effect of increasing the probability of an especially favorable position.[3] Although there may be undesirable consequences of a regulation which permits organization candidates to be grouped in sequence on the ballot, I do not understand the Jurisdictional Statement to present any question as to the propriety of that feature, in and of itself, of the regulation. The questions presented relate only to the impact of the regulation on the ballot positions of the individual appellants.[4] With respect to that matter, I find insufficient indication of unfairness or irreparable injury to warrant the issuance of a stay against enforcement of the judgment of the Supreme Court of Illinois. Presumably because the questions presented are capable of repetition, appellants

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[3] I do not suggest that the advantage precisely offsets the disadvantage; for no doubt, when voters are to choose 10 candidates from a long list of unfamiliar names, there is a risk that many will simply pick the first 10. Nevertheless, the difference between the disadvantage and the advantage hardly seems significant enough to warrant either the emergency attention of this entire Court, or a summary substitution of my judgment for the unanimous appraisal of the problem by the Justices of the Supreme Court of Illinois.

[4] As stated at p. 3 of the Jurisdictional Statement, the questions presented by the appeal are:

"Does the federally-protected right to equal treatment in the assignment of state ballot positions apply only to the top ballot position? Or does it apply to the second and successive positions as well, at least where more than one candidate will be elected to the same office?

"Where a state system for assigning ballot positions increases the likelihood that politically-favored candidates will obtain the higher ballot positions, does that system deny due process, equal protection and political rights as guaranteed by the federal Constitution?"

do not suggest that there is any danger that the election will moot the case; accordingly, the stay need not issue to protect our jurisdiction.

The motion for stay is denied.

FLAMM *v.* REAL-BLT, INC., DBA PONDEROSA ACRES

ON APPLICATION FOR STAY

No. A-731 (75-6263). Decided February 25, 1976

Application to stay Montana Supreme Court's judgment reversing trial court's judgment that applicant tenant was entitled to certain rights under the Due Process Clause of the Fifth Amendment before being evicted from respondent landlord's federally subsidized low-income housing project, is denied in view of lease provision that either party to lease may terminate it by giving 30 days' written notice to other party, thus making it unnecessary to reach any due process issue.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant requests that I stay the judgment of the Supreme Court of Montana in this proceeding contesting her eviction. As matters currently stand, that court has denied a stay and applicant will be evicted on February 29.

Applicant lives in federally subsidized low-income housing which was built and is operated by respondent. On September 26, 1974, respondent sent to applicant a notice to quit, pursuant to the lease which provided that "[e]ither party may terminate this lease . . . by giving 30 days written notice in advance to the other party."

Applicant sued in the Montana state trial court claiming that respondent's project was so intertwined with the Federal Government that its action in evicting her was subject to the limitations of the Due Process Clause of the Fifth Amendment. She further contended that these limitations entitled her to a statement of reasons amounting to a showing of "good cause," and to a hearing before she could be evicted.

The state trial court agreed. The Supreme Court of Montana reversed, holding that the project was suffi-

ciently independent of the Federal Government as to make it subject only to those laws regulating private landlords. The Supreme Court described the above-quoted lease provision, but did not rely upon it in its decision.

In view of the express provision of the lease, it seems to me that this Court, if it were to hear and decide the case, would find it unnecessary to reach the question of whether respondent's activities are subject to the Due Process Clause of the Fifth Amendment. I conclude, therefore, that four Justices of this Court would not vote to grant certiorari in this case. Accordingly, I deny the stay.

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suant to Fed. Rule Civ. Proc. 54 (b), final judgment be entered for respondents, there being no just reason for delay, was not appealable as a final decision under 28 U. S. C. § 1291, nor was it appealable under 28 U. S. C. § 1292's provisions for interlocutory appeals. Liberty Mutual Ins. Co. v. Wetzel, p. 737.

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2. *Discriminatory employment practices—Class action—Seniority relief for unnamed class members.*—In class action against respondent employer and labor unions alleging various racially discriminatory employment practices in violation of Title VII of Act, especially discriminatory refusal to hire over-the-road truckdrivers, § 703 (h) of Act, which provides that it shall not be an unlawful employment practice for an employer, *inter alia,* to apply different conditions of employment pursuant to a bona fide seniority system, does not bar seniority relief to unnamed members of class in question, who are not seeking modification or elimination of existing seniority system but only an award of seniority status they would have individually enjoyed under present system but for illegal discriminatory refusal to hire. Franks v. Bowman Transportation Co., p. 747.

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3. *Discriminatory employment practices—Class action—Seniority relief for unnamed class members.*—In class action against respondent employer and labor unions alleging various racially discriminatory employment practices in violation of Title VII of Act, especially discriminatory refusal to hire over-the-road truckdrivers, denial of seniority relief for unnamed class members cannot be justified as within District Court's discretion on grounds given by that court that such individuals had not filed administrative charges with Equal Employment Opportunity Commission under Title VII and that there was no evidence of a "vacancy, qualification, and performance" for every individual member of class. Nor can denial of such relief be justified as within District Court's discretion on ground that an award of retroactive seniority to class of discriminatees will conflict with economic interests of other employees of respondent. Franks v. Bowman Transportation Co., p. 747.

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I. Appointments Clause.

Composition of Federal Election Commission—Enforcement and rulemaking powers.—Composition of FEC, which consists of two

members appointed by President *pro tempore* of Senate, two by Speaker of House, and two by President (all subject to confirmation by both Houses of Congress), and Secretary of Senate and Clerk of House as *ex officio* nonvoting members, as to all but its investigative and informative powers violates Appointments Clause, Art. II, § 2, cl. 2, which provides in pertinent part that President shall nominate, and with Senate's advice and consent appoint, all "Officers of the United States," whose appointments are not otherwise provided for but that Congress may vest appointment of such inferior officers, as it deems proper, in President alone, in courts, or in heads of departments. With respect to FEC's powers, all of which are ripe for review, to enforce Federal Election Campaign Act of 1971, including primary responsibility for bringing civil actions against violators, to make rules for carrying out Act, to temporarily disqualify federal candidates for failing to file required reports, and to authorize Presidential nominating convention expenditures in excess of specified limits, provisions of Act vesting such powers in FEC and prescribed method of appointment of its members violate Appointments Clause. Buckley v. Valeo, p. 1.

II. Case or Controversy.

1. *Mootness—Class action.*—That petitioner, who was named plaintiff representing class in question in action against respondent employer and labor unions alleging various racially discriminatory employment practices in violation of Title VII of Civil Rights Act of 1964, no longer has a personal stake in outcome of action because he had been hired by respondent and later was properly discharged for cause, does not moot case. An adverse relationship sufficient to meet requirement that a "live controversy" remain before this Court not only obtained as to unnamed members of class with respect to underlying cause of action but also continues with respect to their assertion that relief they have received in entitlement to consideration for hiring and backpay is inadequate without further award of entitlement to seniority benefits. Franks v. Bowman Transportation Co., p. 747.

2. *Validity of Federal Election Campaign Act of 1971 and related Internal Revenue Code provisions.*—Litigation challenging constitutionality of various provisions of FECA and related IRC provisions presents an Art. III "case or controversy," since complaint discloses that at least some of appellants (various federal officeholders and candidates, supporting political organizations, etc.) have a sufficient "personal stake" in a determination of constitutional validity of challenged provisions to present "a real and substantial controversy

CONSTITUTIONAL LAW—Continued.
admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Buckley v. Valeo, p. 1.

III. Commerce Clause.

State regulation of milk from another State—Requirement of reciprocity agreement—Burden on interstate commerce.—With respect to a Mississippi regulation providing that milk and milk products from another State may be sold in Mississippi only if other State accepts milk or milk products produced and processed in Mississippi, mandatory character of regulation's reciprocity requirement unduly burdens free flow of interstate commerce in violation of Commerce Clause and cannot be justified as a permissible exercise of any state power. Great A. & P. Tea Co. v. Cottrell, p. 366.

IV. Due Process.

1. *Defamatory police flyer of "active shoplifters"—Right of action against police.*—Petitioner police chiefs' action in distributing to area merchants flyer of "active shoplifters" including photograph and name of respondent, who had been arrested on a shoplifting charge which was subsequently dismissed, did not deprive respondent of any "liberty" or "property" rights secured against state deprivation by Due Process Clause of Fourteenth Amendment. Paul v. Davis, p. 693.

2. *Disqualification for welfare benefits—"Rebuttable presumption."*—With respect to New York welfare statute disqualifying from receipt of Home Relief benefits for 75 days anyone who voluntarily terminates his employment or reduces his earning capacity for purpose of qualifying for benefits, and further providing, by way of a "rebuttable presumption," that a person who applies for assistance within 75 days after so voluntarily terminating his employment or reducing his earning capacity shall be "deemed" to have done so "for the purpose of qualifying for such assistance or larger amount thereof, in the absence of evidence to the contrary supplied by such person," "rebuttable presumption" provision does not deny due process of law under Fourteenth Amendment. Lavine v. Milne, p. 577.

3. *Juror examination on voir dire—Racial prejudice.*—Absent circumstances comparable in significance to those existing in *Ham* v. *South Carolina*, 409 U. S. 524, examination of veniremen during *voir dire* about racial prejudice is not constitutionally required. In instant case, which involved prosecution of respondent, a Negro, for

CONSTITUTIONAL LAW—Continued.

violent crimes against a white security guard, respondent did not show such circumstances, and there was thus no error of constitutional dimension when state trial judge questioned veniremen about general bias or prejudice but declined to question them specifically about racial prejudice. Ristaino v. Ross, p. 589.

4. *Termination of Social Security disability benefits—Necessity for hearing.*—An evidentiary hearing is not required prior to termination of Social Security disability payments, and administrative procedures prescribed under Social Security Act fully comport with due process. Mathews v. Eldridge, p. 319.

V. Equal Protection of the Laws.

1. *Fifth Amendment—Public financing of Presidential nominating conventions and campaigns—Subtitle H of Internal Revenue Code.*—Subtitle H of IRC—providing for public financing of Presidential nominating conventions and general election and primary campaigns from general revenues, with full funding for "major" parties, a percentage of full funding for "minor" parties, and either only post-election funding, or no funding if insufficient votes are received, for "new" parties—being less burdensome than ballot-access regulations and having been enacted in furtherance of vital governmental interests in relieving major-party candidates from rigors of soliciting private contributions, in not funding candidates who lack significant public support, and in eliminating reliance on large private contributions for funding of conventions and campaigns, does not invidiously discriminate against minor and new parties in violation of Due Process Clause of Fifth Amendment. Buckley v. Valeo, p. 1.

2. *Military post regulations governing political campaigning and distribution of literature.*—Fort Dix regulations banning political speeches and demonstrations on post and governing distribution of literature there were not unconstitutionally applied under circumstances of this case. As to regulation banning political speeches and demonstrations, there is no claim that military authorities discriminated in any way among candidates based upon candidates' supposed political views; on contrary it appears that Fort Dix has a policy, objectively and evenhandedly applied, of keeping official military activities there wholly free of entanglement with any partisan political campaigns, a policy that post was constitutionally free to pursue. As to regulation governing distribution of literature, a military commander may disapprove only those publications that he perceives clearly endanger loyalty, discipline, or morale of troops on base under his command, and, while this regulation might in future be applied irrationally, invidiously, or arbitrarily, none of

CONSTITUTIONAL LAW—Continued.

respondents even submitted any material for review, and non-candidate respondents had been excluded from post because they had previously distributed literature there without attempting to obtain approval. Greer v. Spock, p. 828.

VI. Fifth Amendment.

1. *Double jeopardy—Attorney's misconduct—Mistrial—Retrial.*—Where, after respondent's counsel had been expelled for misconduct during opening-statement period in respondent's criminal trial, judge, upon being advised by co-counsel that respondent wanted expelled counsel to try case, declared a mistrial to permit respondent to obtain another counsel, Double Jeopardy Clause did not bar respondent's retrial. United States v. Dinitz, p. 600.

2. *Privilege against self-incrimination—Income tax returns—Gambling.*—Petitioner's privilege against compulsory self-incrimination was not violated when his income tax returns, in which he revealed himself to be a gambler, were introduced in evidence, over his Fifth Amendment objection, as proof of federal gambling offense with which he was charged. Garner v. United States, p. 648.

VII. First Amendment.

1. *Freedom of association—General disclosure and recordkeeping provisions of Federal Election Campaign Act of 1971.*—Provisions of FECA requiring political committees to keep detailed records of contributions and expenditures, including name and address of each individual contributing in excess of $10, and his occupation and principal place of business if his contribution exceeds $100, and to file quarterly reports with Federal Election Commission disclosing source of every contribution exceeding $100 and recipient and purpose of every expenditure over $100, are constitutional. Such provisions, which serve substantial governmental interests in informing electorate and preventing corruption of political process, are not overbroad insofar as they apply to contributions to minor parties and independent candidates. No blanket exemption for minor parties is warranted since such parties in order to prove injury as a result of application to them of disclosure provisions need show only a reasonable probability that compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals in violation of their First Amendment associational rights. Extension of recordkeeping provisions to contributions as small as those just above $10 and of disclosure provisions to contributions above $100 is not on this record overbroad since it cannot be said to be unrelated to informational and enforcement goals of legislation. Buckley v. Valeo, p. 1.

CONSTITUTIONAL LAW—Continued.

2. *Freedom of association and speech—Disclosure provisions of Federal Election Campaign Act of 1971—Independent contributions and expenditures.*—Provision of FECA requiring every individual or group, other than a candidate or political committee, making contributions or expenditures exceeding $100 "other than by contribution to a political committee or candidate" to file a statement with the Federal Election Commission, is constitutional. Such provision, as narrowly construed to apply only (1) when contributions earmarked for political purposes or authorized or requested by a candidate or his agent are made to some person other than a candidate or political committee and (2) when an expenditure is made for a communication that expressly advocates election or defeat of a clearly identified candidate, is not unconstitutionally vague and does not constitute a prior restraint but is a reasonable and minimally restrictive method of furthering First Amendment values by public exposure of federal election system. Buckley v. Valeo, p. 1.

3. *Freedom of speech—Contribution provisions of Federal Election Campaign Act of 1971.*—Provisions of FECA limiting political contributions to candidates for federal elective office by an individual or a group to $1,000 and by a political committee to $5,000 to any single candidate per election, with an overall annual limitation of $25,000 by an individual contributor, are constitutional. Such provisions are appropriate legislative weapons against reality or appearance of improper influence stemming from dependence of candidates on large campaign contributions, and ceilings imposed accordingly serve basic governmental interest in safeguarding integrity of electoral process without directly impinging upon rights of individual citizens and candidates to engage in political debate and discussion. Buckley v. Valeo, p. 1.

4. *Freedom of speech—Expenditure provisions of Federal Election Campaign Act of 1971.*—Provisions of FECA limiting expenditures by individuals or groups "relative to a clearly identified candidate" to $1,000 per candidate per election, and by a candidate from his personal or family funds to various specified annual amounts depending upon federal office sought, and restricting overall general election and primary campaign expenditures by candidates to various specified amounts, again depending upon federal office sought, violate First Amendment. Such provisions place substantial and direct restrictions on ability of candidates, citizens, and associations to engage in protected political expression, restrictions that First Amendment cannot tolerate. Buckley v. Valeo, p. 1.

CONSTITUTIONAL LAW—Continued.

5. *Freedom of speech—Magazines—Judicial declaration of obscenity—Effect on criminal prosecution.*—Alabama statutory procedures whereby magazines were judicially declared obscene in an *"in rem"* action against magazines, violated First and Fourteenth Amendments insofar as such procedures precluded petitioner, who had not been given notice or made a party to *"in rem"* action, from litigating obscenity *vel non* of one such magazine as a defense to his criminal prosecution for selling it. McKinney v. Alabama, p. 669.

6. *Freedom of speech—Military post regulations governing political campaigning and distribution of literature.*—Fort Dix regulations banning political speeches and demonstrations on post and governing distribution of literature there are not unconstitutionally invalid on their face. Since under Constitution it is basic function of a military installation like Fort Dix to train soldiers, not to provide a public forum, and since, as a necessary concomitant to this basic function, a commanding officer has historically unquestioned power to exclude civilians from area of his command, any notion that federal military installations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is false, and therefore respondents had no generalized constitutional right to make political speeches or distribute leaflets at Fort Dix. Greer v. Spock, p. 828.

7. *Freedom of speech—Public financing of Presidential nominating conventions and campaigns—Subtitle H of Internal Revenue Code.*—Subtitle H of IRC, providing for public financing of Presidential nominating conventions and general election and primary campaigns from general revenues, does not violate First Amendment. Rather than abridging, restricting, or censoring speech, it represents an effort to use public money to facilitate and enlarge public discussion and participation in electoral process. Buckley v. Valeo, p. 1.

8. *Freedom of speech—Right to picket in shopping center.*—Under present state of law constitutional guarantee of free expression has no part to play in a case such as this, where striking members of respondent union picketed in front of their employer's leased store located in petitioner's shopping center, and pickets here did not have a First Amendment right to enter shopping center for purpose of advertising their strike against their employer. Hudgens v. NLRB, p. 507.

9. *Freedom of the press—Media liability for defamation—Constitutional limitations—Damages—Fault.*—In case such as this, where respondent brought a libel suit in Florida court against peti-

tioner magazine publisher for reporting that her husband had obtained a divorce from her "on grounds of extreme cruelty and adultery," when in fact divorce court never made finding that she was guilty of adultery, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, imposes constitutional limitations that (1) compensatory awards "be supported by competent evidence concerning the injury" and (2) liability cannot be imposed without fault. Since Florida permits damages in defamation actions based on elements other than injury to reputation, and there was competent evidence here to permit jury to assess amount of such injury, first of these conditions was satisfied, but since there was no finding of fault on petitioner's part in its publication of defamatory material, second condition was not met. Time, Inc. v. Firestone, p. 448.

10. *Freedom of the press—Media liability for defamation—Public figure.*—Standard enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, as later extended, which bars media liability for defamation of a public figure absent proof that defamatory statements were published with knowledge of their falsity or in reckless disregard of truth, is inapplicable to facts of this case, where respondent brought a libel suit against petitioner magazine publisher for reporting that her husband, scion of a wealthy industrial family, had obtained a divorce from her on his counterclaim "on grounds of extreme cruelty and adultery," when in fact divorce court had never made finding that she was guilty of adultery. Respondent was not a "public figure," and *New York Times* rule does not automatically extend to all reports of judicial proceedings regardless of whether party plaintiff in such proceedings is a public figure who might be assumed to "have voluntarily exposed [himself] to increased risk of injury from defamatory falsehood." Time, Inc. v. Firestone, p. 448.

VIII. General Welfare Clause.

Public financing of Presidential nominating conventions and campaigns—Subtitle H of Internal Revenue Code.—Subtitle H of IRC, providing for public financing of Presidential nominating conventions and general election and primary campaigns from general revenues, is not invalid under General Welfare Clause but, as a means to reform electoral process, was clearly a choice within power granted to Congress by Clause to decide which expenditures will promote general welfare. Buckley v. Valeo, p. 1.

IX. Right to Privacy.

Defamatory police flyer of "active shoplifters."—Respondent's contention that petitioner police chiefs' defamatory flyer of "active

CONSTITUTIONAL LAW—Continued.

shoplifters" including photograph and name of respondent, who had been arrested on a shoplifting charge which was subsequently dismissed, deprived him of his constitutional right to privacy is without merit, being based not upon any challenge to State's ability to restrict his freedom of action in a sphere contended to be "private" but on a claim that State may not publicize a record of an official act like an arrest. Paul v. Davis, p. 693.

X. Right to Travel.

City employees—Residency requirement.—Philadelphia municipal regulation requiring city employees to be residents of city is constitutional as a bona fide continuing residence requirement and does not violate right of interstate travel of appellant, whose employment as a city fireman was terminated under regulation because he moved his residence from Philadelphia to New Jersey. McCarthy v. Philadelphia Civil Service Comm'n, p. 645.

XI. Severability.

Public financing of Presidential nominating conventions and campaigns—Subtitle H of Internal Revenue Code.—Invalidation of spending-limit provisions of Federal Election Campaign Act of 1971 does not render unconstitutional Subtitle H of IRC, which provides for public financing of Presidential nominating conventions and general election and primary campaigns from general revenues, but Subtitle H is severable from such provisions and is not dependent upon existence of a generally applicable expenditure limit. Buckley v. Valeo, p. 1.

XII. Supremacy Clause.

State prohibition against employment of aliens.—Section 2805 (a) of California Labor Code, which prohibits an employer from knowingly employing an alien who is not entitled to lawful residence in United States if such employment would have an adverse effect on lawful resident workers, is not unconstitutional as a regulation of immigration or as being pre-empted under Supremacy Clause by Immigration and Nationality Act. DeCanas v. Bica, p. 351.

CONSTITUTIONAL LIMITATIONS IN DEFAMATION ACTIONS. See **Constitutional Law**, VII, 9–10.

CONTINUING RESIDENCE REQUIREMENT FOR CITY EMPLOYEES. See **Constitutional Law**, X.

CONTRACTS FOR SALE OF NATURAL GAS. See **Natural Gas Act.**

COUNTY ELECTIONS. See **Elections.**

COURT OF CLAIMS. See also **Government Employees.**

Tucker Act—Action seeking civil service reclassification—Court's power to remand to Civil Service Commission.—Tucker Act, which merely confers jurisdiction on Court of Claims whenever a substantive right enforceable against United States for money damages exists, does not in itself support action taken by Court of Claims in this case, wherein, in an action by respondent Government trial attorneys seeking civil service reclassification to a higher grade and backpay, court remanded case to CSC to compare respondents' positions with those of other Government trial attorneys and report result to court. United States v. Testan, p. 392.

COURT-ORDERED REAPPORTIONMENT PLANS. See **Elections.**

COURTS OF APPEALS. See **Stays,** 3.

CRIMINAL LAW. See also **Constitutional Law,** IV, 3; VI, 1–2; VII, 5; **Mandamus.**

1. *Bank robbery—Error in not dismissing count for possessing robbery proceeds—Remedy.*—Where respondents were convicted on counts charging bank robbery and assault with a dangerous weapon during robbery and also on a count charging possession of robbery proceeds, Court of Appeals was mistaken in requiring a new trial as remedy for trial court's not having dismissed latter count for lack of proof, since error can be corrected by vacating convictions and sentences under that count, and sentences under counts for bank robbery should also be vacated. United States v. Gaddis, p. 544.

2. *Bank robbery—Propriety of conviction of receiving or possessing robbery proceeds.*—A person convicted of robbing a bank in violation of 18 U. S. C. §§ 2113 (a) and (b) and of assault with a dangerous weapon during robbery in violation of § 2113 (d), cannot also be convicted of receiving or possessing robbery proceeds in violation of § 2113 (c). United States v. Gaddis, p. 544.

DAMAGES IN DEFAMATION ACTIONS. See **Constitutional Law,** VII, 9.

DEFAMATION BY NEWS MEDIA. See **Constitutional Law,** VII, 9–10.

DEFAMATION BY STATE OFFICIAL. See **Constitutional Law,** IV, 1; IX.

EXAMINATION OF VENIREMEN. See **Constitutional Law**, IV, 3.

EXHAUSTION OF ADMINISTRATIVE REMEDIES. See **Jurisdiction**, 1.

EXTRADITION. See **Internal Revenue Code.**

FAILURE TO EFFECTUATE SUPREME COURT'S JUDGMENT. See **Mandamus.**

FAIR REPRESENTATION BY UNION. See **Labor Management Relations Act.**

FARM LABOR CONTRACTOR REGISTRATION ACT. See **Constitutional Law**, XII.

FAULT IN DEFAMATION ACTIONS. See **Constitutional Law**, VII, 9.

FEDERAL ELECTION CAMPAIGN ACT OF 1971. See **Constitutional Law**, II, 2; VII, 1–4; XI.

FEDERAL ELECTION COMMISSION. See **Constitutional Law**, I; VII, 1–2.

FEDERAL EMPLOYEES. See **Court of Claims; Government Employees.**

FEDERALLY SUBSIDIZED LOW-INCOME HOUSING. See **Stays**, 1.

FEDERAL POWER COMMISSION. See **Natural Gas Act.**

FEDERAL RULES OF CIVIL PROCEDURE. See **Appeals.**

FEDERAL-STATE RELATIONS. See **Abstention; Constitutional Law**, III; XII; **Jurisdiction**, 2–4.

FEDERAL WATER RIGHTS. See **Abstention; Jurisdiction**, 2–4.

FEMALE EMPLOYEES. See **Appeals.**

FIFTH AMENDMENT. See **Constitutional Law**, IV, 4; V; VI; **Eminent Domain**, 2; **Stays**, 1.

FINAL AND BINDING ARBITRATION. See **Labor Management Relations Act.**

FINAL DECISIONS. See **Appeals; Jurisdiction**, 1.

FIREMEN. See **Constitutional Law**, X.

FIRST AMENDMENT. See **Constitutional Law**, VII.

FLORIDA. See **Mandamus.**

FORT DIX. See **Constitutional Law**, V, 2; VII, 6.

FOURTEENTH AMENDMENT. See **Constitutional Law**, IV, 1–2; VII, 5.

FREEDOM OF ASSOCIATION. See **Constitutional Law**, VII, 1–2.

FREEDOM OF SPEECH. See **Constitutional Law**, VII, 2–8.

FREEDOM OF THE PRESS. See **Constitutional Law**, VII, 9–10.

GAMBLING OFFENSES. See **Constitutional Law**, VI, 2.

GENERAL WELFARE CLAUSE. See **Constitutional Law**, VIII.

GOVERNMENT EMPLOYEES. See also **Court of Claims.**

Classification Act—Back Pay Act—Action seeking civil service reclassification—Right to backpay.—In action in Court of Claims by respondent Government trial attorneys seeking civil service reclassification to higher grade and backpay, neither Classification Act nor Back Pay Act creates a substantive right in respondents to backpay for period of claimed wrongful classification. United States v. Testan, p. 392.

GRAZING LEASES. See **Eminent Domain.**

GRIEVANCE PROCEDURES. See **Labor Management Relations Act.**

HOME RELIEF WELFARE BENEFITS. See **Constitutional Law**, IV, 2.

ILLEGAL ALIENS. See **Constitutional Law**, XII.

ILLINOIS. See **Stays**, 2.

IMMIGRATION AND NATIONALITY ACT. See **Constitutional Law**, XII.

IMMUNITY OF PROSECUTING ATTORNEY FROM CIVIL DAMAGES SUIT. See **Civil Rights Act of 1871.**

IMPARTIAL TRIALS. See **Constitutional Law**, IV, 3.

INCOME TAXES. See **Internal Revenue Code.**

INCOME TAX RETURNS. See **Constitutional Law**, VI, 2.

INCRIMINATION. See **Constitutional Law**, VI, 2.

INDIANS. See **Jurisdiction**, 5.

INDIAN WATER RIGHTS. See **Abstention; Jurisdiction**, 2–4.

INJUNCTIONS. See **Internal Revenue Code.**

INJURY TO REPUTATION. See **Constitutional Law,** IV, 1; IX.

IN REM PROCEEDINGS. See **Constitutional Law,** VII, 5.

INTERLOCUTORY APPEALS. See **Appeals.**

INTERNAL REVENUE CODE. See also **Constitutional Law, II,** 2; V, 1; VII, 7; VIII; XI.

Jeopardy assessment—Taxpayer's suit—Anti-Injunction Act.—Where, after a jeopardy income tax assessment had been made against respondent because of his imminent departure for Israel under an extradition order to stand trial there on criminal charges, and various bank accounts of his were levied, he brought suit, claiming that he owed no taxes, that he could not litigate issue while jailed in Israel, and that he would be in jail there unless he could use levied bank accounts as bail money, and seeking an injunction against his extradition until he could litigate whether he owed taxes, Anti-Injunction Act did not require dismissal of respondent's complaint. Commissioner v. Shapiro, p. 614.

INTERSTATE COMMERCE. See **Constitutional Law,** III.

INVIDIOUS DISCRIMINATION. See **Constitutional Law,** V, 1.

IRREPARABLE INJURY. See **Internal Revenue Code; Stays,** 2–3.

JEOPARDY ASSESSMENTS. See **Internal Revenue Code.**

JUDICIAL DECLARATIONS OF OBSCENITY. See **Constitutional Law,** VII, 5.

JUDICIAL REVIEW. See **Court of Claims; Jurisdiction,** 1.

JURIES. See **Constitutional Law,** IV, 3.

JURISDICTION. See also **Abstention; Court of Claims.**

1. *District Court—Termination of Social Security disability benefits—Action challenging procedures.*—District Court had jurisdiction over respondent's claim that procedures for terminating Social Security disability benefits were unconstitutional, since state agency's denial, as accepted by Social Security Administration, of respondent's request for benefits was a final decision with respect to that claim for purposes of jurisdiction under 42 U. S. C. § 405 (g), which grants jurisdiction only to review a "final" decision of Secretary of Health, Education, and Welfare made after a hearing to which he was a party. Mathews v. Eldridge, p. 319.

2. *State-court determination of water rights—McCarran Amendment—Indian water rights.*—McCarran Amendment, 43 U. S. C. § 666, includes consent to determine in state court reserved water

JURISDICTION—Continued.

rights held on behalf of Indians, and exercise of state jurisdiction does not imperil those rights or breach Government's special obligation to protect Indians. Colorado River Water Cons. Dist. v. U. S., p. 800.

3. *Suit by United States for determination of water rights—Desirability of unified adjudication—McCarran Amendment—Dismissal.*—In suit for determination of water rights brought in Federal District Court by United States as trustee for certain Indian tribes and as owner of various non-Indian Government claims, several factors are present that counsel against exercise of concurrent federal jurisdiction, clearly supporting dismissal of action and resolution of Government's water-right claims in state-court proceedings. Most significantly, such dismissal furthers policy of McCarran Amendment, 43 U. S. C. § 666, recognizing desirability of unified adjudication of water rights and availability of state systems like one in Colorado for such adjudication and management of rights to use State's waters. Colorado River Water Cons. Dist. v. U. S., p. 800.

4. *Suit by United States for determination of water rights—Effect of McCarran Amendment.*—McCarran Amendment, 43 U. S. C. § 666, as is clear from its language and legislative history, did not divest District Court of jurisdiction under 28 U. S. C. § 1345 over suit for determination of water rights brought by United States as trustee for certain Indian tribes and as owner of various non-Indian Government claims. Effect of Amendment is to give consent to state jurisdiction concurrent with federal jurisdiction over controversies involving federal water rights. Colorado River Water Cons. Dist. v. U. S., p. 800.

5. *Tribal court—Adoption proceeding on Indian reservation.*—Tribal court of Northern Cheyenne Tribe has exclusive jurisdiction over an adoption proceeding arising on Northern Cheyenne Indian Reservation in which all parties are members of tribe residing on reservation. Fisher v. District Court, p. 382.

JUST COMPENSATION. See **Eminent Domain.**

JUSTICIABILITY. See **Constitutional Law**, II.

LABOR. See **Constitutional Law**, VII, 8; **Labor Management Relations Act; National Labor Relations Act.**

LABOR MANAGEMENT RELATIONS ACT.

Wrongful-discharge suit—Improper dismissal—Union's duty of fair representation.—It was improper to dismiss petitioner employees' suit under § 301 of Act against respondent employer and

LABOR MANAGEMENT RELATIONS ACT—Continued.

respondent union for wrongful discharge, since if petitioners prove an erroneous discharge and union's breach of duty of fair representation tainting arbitration committee's decision upholding discharges, they are entitled to an appropriate remedy against employer as well as union. A union's breach of duty relieves employee of an express or implied requirement that disputes be settled through contractual procedures and, if it seriously undermines integrity of arbitral process, also removes bar of contract provision making arbitration decision final and binding on all parties. Hines v. Anchor Motor Freight, p. 554.

LABOR UNIONS. See **Labor Management Relations Act.**

LANDLORD AND TENANT. See **Stays**, 1.

LARCENY. See **Criminal Law.**

LEASES. See **Eminent Domain**; **Stays**, 1.

LIBEL. See **Constitutional Law**, VII, 9–10.

LIBERTY RIGHTS. See **Constitutional Law**, IV, 1.

LIKELIHOOD OF SUCCESS ON MERITS. See **Stays**, 3.

LIMITATIONS ON POLITICAL CONTRIBUTIONS AND EXPENDITURES. See **Constitutional Law**, VII, 3–4.

LIVE CONTROVERSY. See **Constitutional Law**, II, 1.

LOTTERIES FOR ASSIGNING BALLOT POSITIONS. See **Stays**, 2.

LOUISIANA. See **Constitutional Law**, III; **Elections.**

LOW-INCOME HOUSING. See **Stays**, 1.

MAGAZINES. See **Constitutional Law**, VII, 5.

MAJOR POLITICAL PARTIES. See **Constitutional Law**, V, 1.

"MAKE-WHOLE" PURPOSES OF CIVIL RIGHTS ACT OF 1964. See **Civil Rights Act of 1964.**

MALAPPORTIONMENT. See **Elections.**

MANDAMUS.

State court's failure to effectuate Supreme Court's judgment.— Where further proceedings pursuant to an information charging petitioners with violating Florida's obscenity statute were foreclosed by this Court's judgment summarily reversing Florida Supreme Court's affirmance of petitioners' convictions, latter court, by remanding case to trial court for further proceedings, failed to

MANDAMUS—Continued.

effectuate this Court's judgment, and such failure was not cured by intervening exercise of prosecutorial discretion in *nolle prossing* charges. Accordingly, petitioners' motion for leave to file a petition to mandamus Florida Supreme Court to conform its decision to this Court's mandate is granted. Bucolo v. Adkins, p. 641.

MANDATES. See **Mandamus.**

MATERNITY LEAVE REGULATIONS. See **Appeals.**

McCARRAN AMENDMENT (McCARRAN WATER RIGHTS SUIT ACT). See **Jurisdiction,** 2–4.

MEDIA LIABILITY FOR DEFAMATION. See **Constitutional Law,** VII, 9–10.

MILITARY INSTALLATION REGULATIONS. See **Constitutional Law,** V, 2; VII, 6.

MILK AND MILK PRODUCTS. See **Constitutional Law,** III.

MINOR POLITICAL PARTIES. See **Constitutional Law,** V, 1; VII, 1.

MISSISSIPPI. See **Constitutional Law,** III.

MISTRIALS. See **Constitutional Law,** VI, 1.

MONTANA. See **Jurisdiction,** 5; **Stays,** 1.

MOOTNESS. See **Constitutional Law,** II, 1; **Stays,** 2.

MOTOR VEHICLE SAFETY STANDARDS. See **Stays,** 3.

MULTIMEMBER REAPPORTIONMENT PLANS. See **Elections.**

MUNICIPAL REGULATIONS. See **Constitutional Law,** X.

NATIONAL LABOR RELATIONS ACT.

Right to picket in shopping center.—Where striking members of respondent union picketed in front of their employer's leased store located in petitioner's shopping center, rights and liabilities of parties are dependent exclusively upon Act, under which it is National Labor Relations Board's task, subject to judicial review, to resolve conflicts between rights under § 7 of Act and private property rights and to seek accommodation of such rights "with as little destruction of one as is consistent with maintenance of the other." Hudgens v. NLRB, p. 507.

NATIONAL LABOR RELATIONS BOARD. See **National Labor Relations Act.**

NATURAL GAS ACT.

Federal Power Commission—Pregranted authority to producer to abandon natural gas sales.—An optional procedure which encompasses pregranted authority to natural gas producers to abandon gas sales and which is intended to draw new gas supplies to interstate market, is clearly within FPC's authority under § 7 (b) of Act to permit abandonments justified by *present* or *future* public convenience or necessity, timing of abandonment approval being within FPC's discretion. FPC v. Moss, p. 494.

NEGROES. See **Civil Rights Act of 1964; Constitutional Law,** II, 1; IV, 3.

NEW MEXICO-ARIZONA ENABLING ACT. See **Eminent Domain.**

NEW POLITICAL PARTIES. See **Constitutional Law,** V, 1.

NEW TRIALS. See **Constitutional Law,** VI, 1; **Criminal Law,** 1.

NEW YORK. See **Constitutional Law,** IV, 2.

NORTHERN CHEYENNE TRIBE. See **Jurisdiction,** 5.

OBSCENITY. See **Constitutional Law,** VII, 5; **Mandamus.**

OFFICERS OF THE UNITED STATES. See **Constitutional Law,** I.

ONE-MAN, ONE-VOTE PRINCIPLE. See **Elections.**

OPPORTUNITY FOR HEARING. See **Constitutional Law,** IV, 4.

OVERBREADTH. See **Constitutional Law,** VII, 1.

OVER-THE-ROAD TRUCK DRIVERS. See **Civil Rights Act of 1964.**

PARISH ELECTIONS. See **Elections.**

PERSONAL STAKE IN OUTCOME OF CASE. See **Constitutional Law,** II.

PHILADELPHIA. See **Constitutional Law,** X.

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POLICE FLYERS OF SHOPLIFTERS. See **Constitutional Law,** IV, 1; IX.

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POLITICAL CANDIDATES. See **Constitutional Law,** II, 2; V, 1; VII, 1–4, 7; VIII; XI.

POLITICAL CONTRIBUTIONS AND EXPENDITURES. See Constitutional Law, VII, 3–4.

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PUBLIC EMPLOYEES. See Constitutional Law, X.

PUBLIC FIGURES. See Constitutional Law, VII, 9–10.

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QUALIFICATION FOR WELFARE BENEFITS. See Constitutional Law, IV, 2.

RACIAL DISCRIMINATION. See **Civil Rights Act of 1964; Constitutional Law, II, 1.**

RACIAL PREJUDICE OF JURIES. See **Constitutional Law, IV, 3.**

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RECIPROCITY AGREEMENTS AS TO MILK PRODUCTION AND SALES. See **Constitutional Law, III.**

RECLASSIFICATION OF CIVIL SERVICE POSITIONS. See **Court of Claims; Government Employees.**

RECORDKEEPING OF POLITICAL CONTRIBUTIONS AND EXPENDITURES. See **Constitutional Law, VII, 1.**

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REMAND. See **Court of Claims; Eminent Domain, 1.**

REPUTATION. See **Constitutional Law, IV, 1; IX.**

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RIGHT TO BACKPAY FOR WRONGFUL CIVIL SERVICE CLASSIFICATION. See **Government Employees.**

RIGHT TO LIBERTY. See **Constitutional Law, IV, 1.**

RIGHT TO PICKET IN SHOPPING CENTER. See **Constitutional Law, VII, 8; National Labor Relations Act.**

RIGHT TO PRIVACY. See **Constitutional Law, IX.**

RIGHT TO PROPERTY. See **Constitutional Law**, IV, 1.

RIGHT TO TERMINATE LEASE. See **Stays**, 1.

RIGHT TO TRAVEL. See **Constitutional Law**, X.

ROBBERY. See **Criminal Law.**

RULES OF CIVIL PROCEDURE. See **Appeals.**

SALES OF NATURAL GAS. See **Natural Gas Act.**

SECRETARY OF TRANSPORTATION. See **Stays**, 3.

SELF-INCRIMINATION. See **Constitutional Law**, VI, 2.

SENIORITY BENEFITS. See **Civil Rights Act of 1964; Constitutional Law**, II, 1.

SENTENCES. See **Criminal Law**, 1.

SEVERABILITY. See **Constitutional Law**, XI.

SEX DISCRIMINATION. See **Appeals.**

SHOPLIFTING. See **Constitutional Law**, IV, 1; IX.

SHOPPING CENTERS. See **Constitutional Law**, VII, 8; **National Labor Relations Act.**

SINGLE-MEMBER REAPPORTIONMENT PLANS. See **Elections.**

SOCIAL SECURITY ACT. See **Constitutional Law**, IV, 4; **Jurisdiction**, 1.

STANDING TO SUE. See **Constitutional Law**, II, 2.

STATE COURTS. See **Jurisdiction**, 2–5.

STATE PROSECUTING ATTORNEYS. See **Civil Rights Act of 1871.**

STATE WATER RIGHTS. See **Abstention; Jurisdiction**, 2–4.

STAYS.

1. *Eviction—Low-income housing project—Termination provision of lease.*—Application to stay Montana Supreme Court's judgment reversing trial court's judgment that applicant tenant was entitled to certain rights under Due Process Clause of Fifth Amendment before being evicted from respondent landlord's federally subsidized low-income housing project, is denied in view of lease provision that either party to lease may terminate it by giving 30 days' written notice to other party, thus making it unnecessary to reach any due process issue. Flamm v. Real–BLT, Inc. (REHNQUIST, J., in chambers), p. 1313.

STAYS—Continued.

2. *Lottery to assign ballot positions—Lack of irreparable injury or mootness.*—Application by appellant independent candidates for judicial office in Illinois to stay, pending this Court's disposition of appeal, of Illinois Supreme Court's judgment reversing Circuit Court's order enjoining appellee State Board of Elections Commissioners from conducting a lottery to assign ballot positions in accordance with Board regulation prescribing lottery system for breaking ties resulting from simultaneous filing of petitions for nomination to elective office, is denied, where there is insufficient indication of unfairness or irreparable injury and (because questions presented by appeal are capable of repetition) no suggestion that forthcoming election will moot case. Bradley v. Lunding (STEVENS, J., in chambers), p. 1309.

3. *Motor vehicle safety standard—Irreparable harm.*—Application by Secretary of Transportation to vacate Court of Appeals' order staying operation of a certain motor vehicle safety standard, which was before court upon respondents' petition for review, is granted, where it appears that Court of Appeals in ordering stay failed to consider likelihood of respondents' success on merits, and Secretary has demonstrated that irreparable harm might result from stay. Coleman v. PACCAR Inc. (REHNQUIST, J., in chambers), p. 1301.

STRIKES. See **Constitutional Law**, VII, 8; **National Labor Relations Act.**

SUMMARY SEIZURE OF TAXPAYER'S ASSETS. See **Internal Revenue Code.**

SUPREMACY CLAUSE. See **Constitutional Law**, XII.

SUPREME COURT. See also **Mandamus.**

Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Third Circuit, p. 959.

TAX ASSESSMENT AND COLLECTION. See **Internal Revenue Code.**

TERMINATION OF LEASE. See **Stays**, 1.

TERMINATION OF SOCIAL SECURITY DISABILITY BENEFITS. See **Constitutional Law**, IV, 4; **Jurisdiction**, 1.

TRANSPORTATION SECRETARY. See **Stays**, 3.

TRIAL ATTORNEYS. See **Court of Claims**; **Government Employees.**

TRIBAL COURTS. See **Jurisdiction**, 5.

TRUCK DRIVERS. See **Civil Rights Act of 1964.**

TUCKER ACT. See **Court of Claims.**

UNFAIR LABOR PRACTICES. See **Constitutional Law**, VII, 8; **National Labor Relations Act.**

UNIONS. See **Labor Management Relations Act.**

UNITED STATES. See **Abstention**; **Eminent Domain**; **Jurisdiction**, 2–4.

UNLAWFUL EMPLOYMENT DISCRIMINATION. See **Appeals**; **Civil Rights Act of 1964**; **Constitutional Law**, II, 1.

VACATION OF SENTENCES AND CONVICTIONS. See **Criminal Law**, 1.

VACATION OF STAY. See **Stays**, 3.

VAGUENESS. See **Constitutional Law**, VII, 2.

VOIR DIRE. See **Constitutional Law**, IV, 3.

VOLUNTARY TERMINATION OF EMPLOYMENT. See **Constitutional Law**, IV, 2.

WATER RIGHTS. See **Abstention**; **Jurisdiction**, 2–4.

WELFARE BENEFITS. See **Constitutional Law**, IV, 2.

WITNESSES. See **Constitutional Law**, VI, 2.

WOMEN EMPLOYEES. See **Appeals.**

WRONGFUL DISCHARGES OF EMPLOYEES. See **Labor Management Relations Act.**

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